To Be Argued By:
Misha Tseytlin
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT

Docket No.
2024-04378

ORAL CLARKE, ROMANCE REED, GRACE PEREZ, PETER RAMON, ERNEST TIRADO, and DOROTHY FLOURNOY,

Plaintiffs-Respondents,

against

TOWN OF NEWBURGH and
TOWN BOARD OF THE TOWN OF NEWBURGH,

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

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Orange County Clerk's Index No. EF002460/2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Defendants-Appellants Town of Newburgh (the "Town") and Town Board of the Town of Newburgh (the "Town Board" and collectively with the Town, "Defendants"), by their attorneys, submit this brief in support of their appeal from the Decision and Order, dated May 17, 2024 and entered in the office of the Orange County Clerk on May 17, 2024 (the "Order"), which denied Defendants' motion to dismiss. This appeal is taken from each portion of the Order.

QUESTION PRESENTED

QUESTION: Whether the Town Board enacted a valid resolution under Section 17-206(7)(b) of the John R. Lewis Voting Rights Act of New York, entitling the Town to a 90-day safe harbor during which Plaintiffs-Respondents were precluded from filing a NYVRA lawsuit.

ANSWER: Yes. The Supreme Court's contrary conclusion was legally incorrect.

NATURE OF THE CASE

I. INTRODUCTION

The John R. Lewis Voting Rights Act of New York ("NYVRA") allows voters to challenge certain voting practices and procedures, but only after they notify the political subdivision of the alleged violation and give it the opportunity to examine and, if necessary, modify the challenged procedures. A political subdivision that receives notice of an alleged NYVRA violation may avoid an immediate, costly NYVRA lawsuit by passing a resolution within 50 days affirming its intent to remedy

any potential violation. That resolution must identify specific steps and a schedule to govern the political subdivision's evaluation and enactment of any potential remedy. If the political subdivision passes such a resolution, it is statutorily entitled to a 90-day safe harbor from a NYVRA lawsuit.

The Town of Newburgh followed the NYVRA's procedures precisely, and so was entitled to a 90-day safe harbor that prevented Plaintiffs-Respondents ("Plaintiffs") from filing this lawsuit. Specifically, after receiving Plaintiffs' January 26, 2024 letter alleging (with minimal information) that the Town's at-large election system violates the NYVRA, the Town Board passed a NYVRA resolution on March 15, 2024 (the "Resolution"), explicitly affirming its intent to remedy any potential NYVRA violation, identifying the specific steps that the Town Board would take to investigate Plaintiffs' allegations and implement a remedy for any potential violation, and setting forth a schedule for such implementation. Nevertheless, in defiance of the Resolution's effect and the statutory scheme, Plaintiffs prematurely filed this lawsuit on March 26, 2024.

The Supreme Court below concluded that Defendants had not properly availed themselves of the 90-day safe harbor, but that decision was legal error. The Supreme Court's core holding was that the Resolution was deficient because it built in time for the Town Board to investigate Plaintiffs' mere *allegations* prior to committing definitively to change the Town's long-standing system for electing

Town Board members. But the statutory text and context make clear that a political subdivision need not pre-commit to implementing a specific remedy when passing a NYVRA resolution, given that the municipality has not had time to investigate adequately the alleged NYVRA violation. The Supreme Court's contrary, atextual interpretation forces municipalities into a Hobson's choice of defending against a costly NYVRA lawsuit or pre-committing to change their election system before having time to investigate whether any such change is legally justified.

The Supreme Court's decision imposes upon Defendants and other New York municipalities a heightened, irrational burden found nowhere in the NYVRA's text, and this Court should reverse and order dismissal of Plaintiffs' premature lawsuit.

II. LEGAL BACKGROUND

The NYVRA prohibits voting practices and procedures that "result[ ] in a denial or abridgement of the right of members of a protected class to vote," N.Y. Elec. Law § 17-206(1), as well as the use of "any method of election" that "impair[s] the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections," *id.* § 17-206(2). The statute provides specific instructions about the evidentiary standard required and the "factors that may be considered," *id.* § 17-206(3), to establish a violation, *id.* § 17-206(1)(b), (2)(c), (3). The law also lists "appropriate remedies" that a court may implement "to ensure that voters of race, color, and language-minority groups have equitable access to fully

participate in the electoral process," *id.* § 17-206(5), and details the "[p]rocedures" a political subdivision must take if a NYVRA violation exists, in order to "implement[ ] new or revised districting or redistricting plans," *id.* § 17-206(6). A plaintiff who prevails against a political subdivision in a NYVRA lawsuit may recover reasonable attorneys' fees and litigation expenses. *Id.* § 17-218.

The NYVRA imposes a mandatory notification requirement on plaintiffs that want to file a lawsuit under the statute. *Id.* § 17-206(7). "Before commencing a judicial action against a political subdivision . . . a prospective plaintiff shall send" a "NYVRA notification letter" to "the governing body of the political subdivision . . . asserting that the political subdivision may be in violation of" the NYVRA. *Id.* A plaintiff may not commence a lawsuit premised on a potential NYVRA violation "within fifty days of sending" the NYVRA notification letter. *Id.* § 17-206(7)(a). This 50-day period gives the political subdivision an opportunity to pass a "NYVRA resolution." *Id.* § 17-206(7)(b). Specifically, a political subdivision that receives a NYVRA notification letter may, "within fifty days of [the] mailing of a NYVRA notification letter," pass a "NYVRA resolution" affirming: (1) "the political subdivision's intention to enact and implement a remedy for a potential violation of this title"; (2) "specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy"; and (3) "a schedule for enacting and implementing such a remedy." *Id.*

After a "political subdivision passes a NYVRA resolution," it is entitled to a "safe harbor" period, "during which a prospective plaintiff shall not commence an action." *Id.* This safe-harbor provision gives the political subdivision 90 days after passing the NYVRA resolution "to enact and implement" a remedy to cure the alleged violation. *Id.* If the subdivision "lacks the authority" to "enact or implement a remedy," *id.* § 17-206(7)(c), then it may "approve a proposed remedy that complies with" the NYVRA—*i.e.*, a "NYVRA proposal," *id.* § 17-206(7)(c)(i)—after holding "at least one public hearing, at which the public shall be invited to provide input regarding the" proposed remedy, *id.* § 17-206(7)(c)(ii), "and submit such a proposed remedy to the" Civil Rights Bureau of the Office of the Attorney General, for the Bureau's ultimate approval, *id.* § 17-206(7)(c)(i), (iii).

Until the 90-day safe-harbor period is over, a prospective plaintiff may not bring suit to assert potential NYVRA violations. *See id.* § 17-206(7)(b). The political subdivision and prospective plaintiff may also agree to extend this 90-day safe harbor for an additional 90 days, so long as the political subdivision agrees to "enact and implement a remedy" or "pass a NYVRA proposal and submit it to the civil rights bureau" within this extended time period. *Id.* § 17-206(7)(d).[1]

[1] The NYVRA provides one exception to the safe harbor, which exception is inapplicable here. If either (i) "the first day for designating petitions for a political subdivision's next regular election to select members of its governing board has begun or is scheduled to begin within thirty days," or (ii) "a political subdivision is scheduled to conduct any election within" 120 days, then

III. LITIGATION BACKGROUND

A. Plaintiffs Send The Town A Letter Alleging Violations Of The NYVRA And The Town Board Adopts A Resolution Under The NYVRA

The Town of Newburgh is a political subdivision of the State of New York. (R.47). The Town Board is the Town's legislative and policymaking authority. *See* N.Y. Town Law § 60; Div. of Loc. Gov't Servs., N.Y. Dep't of State, *Local Government Handbook* 72–73 (7th ed. 2018) ("*Loc. Gov't Handbook*").[2] Like "almost all towns" in the State of New York, *Loc. Gov't Handbook*, *supra*, at 74–75, the Town uses an at-large voting system for the election of the Town Board's four members and its Supervisor, such that "all of the voters of the entire political subdivision elect each of the members to the governing body," and each member represents the Town "at-large," rather than a limited geographic area therein, N.Y. Elec. Law § 17-204(1). The Orange County Board of Elections administers the Town's elections. *See* N.Y. Elec. Law § 3-200 *et seq.*; Board of Elections, Orange County, New York.[3]

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a plaintiff may file suit without waiting for the 90-day safe harbor to expire, so long as "the relief sought by such a plaintiff includes preliminary relief for that election." N.Y. Elec. Law § 17-206(7)(f).

[2] Available at https://dos.ny.gov/system/files/documents/2023/06/localgovernmenthandbook_2023.pdf (all websites last visited July 15, 2024).

[3] Available at https://www.orangecountygov.com/783/Board-of-Elections.

On January 30, 2024, Plaintiffs sent a letter to the Town dated and postmarked January 26, 2024 (the "Notification Letter"). (*See* R.79–83). The Notification Letter asserted that the Town Board's at-large method of election violates the NYVRA because (i) certain "statistical methods" "reveal[ ] . . . patterns of racially polarized voting with respect to African American and Hispanic voters and demonstrates that the voting preferences . . . of African American and Hispanic voters differ markedly from those of white voters within the jurisdiction," and (ii) "the African American and Hispanic communities are less able to elect candidates of their choice." (R.79). The Notification Letter was just over two pages long, and contained only a few paragraphs explaining the basis for Plaintiffs' NYVRA allegations. (*See* R.79–81). The Letter did not attach any evidence or even cite to any authority to support Plaintiffs' claims of racially polarized voting or purported disenfranchisement. (*See* R.79). Rather, the bulk of the Notification Letter alerted the Town to Plaintiffs' intent to file suit if the Town did not cure the merely alleged violations, including Plaintiffs' intent to seek attorneys' fees in connection with any NYVRA litigation. (*See* R.80).

On March 15, 2024—49 days after Plaintiffs mailed the Notification Letter—the Town Board adopted the Resolution of the Town Board of the Town of Newburgh Pertaining to New York State Election Law 17-206 (the "Resolution"). The Town Board adopted this Resolution at a "special meeting of the Town Board,"

and after the Resolution was "duly put to a vote on roll call." (*See* R.84, 86). With two Town Board Councilmembers and the Town Supervisor voting in favor, "[t]he resolution was thereupon declared duly adopted." (R.86). As the Resolution makes clear, "it is the public policy" of both the State of New York and the Town "to encourage participation in the elective franchise by all eligible voters to the maximum extent." (R.85). That "public policy" includes "ensur[ing] that eligible voters who are members of racial and language-minority groups have an equal opportunity to participate in the political processes of the State of New York, and especially to exercise the elective franchise." (R.85). To realize this public policy goal, the Resolution stipulates that the Town Board will "proactively review the Town's current at-large election system for members of the Town Board," and confirms that the Town Board "intends" to "implement remedies for any potential violation of the NYVRA that may exist." (R.85).

The Resolution calls for the Town Board to take a series of specific, detailed steps within 90 days to investigate and remedy a *potential* NYVRA violation. First, the Town Board must work with a law firm and experts to (i) investigate the at-large voting system, (ii) "determine whether any potential violation of the NYVRA may exist," and (iii) "evaluate potential alternatives to bring the election system into compliance with the NYVRA" if "a potential violation [is] determined to exist." (R.85). Second, "[t]he findings and evaluation" of the at-large voting system must

be "reported to the Town Board within" 30 "days of the date of th[e] Resolution," at which time the Town Board must consider those findings—along with any information that Plaintiffs' legal counsel provides—to determine whether "there may be a violation of the NYVRA." (R.85–86). Third, if the Town Board finds "that there may be" a NYVRA violation, it must "cause a written proposal of the selected remedy(ies) that comply with the NYVRA [ ] to be prepared and presented to the Town Board" within the next 10 days. (R.86). Fourth, within 30 days after "the presentation of the NYVRA Proposal," the Town Board must (i) hold at least two public hearings on the proposed remedies to give the public an opportunity "to provide input" on the NYVRA Proposal as well as "the proposed remedy(ies) set forth therein," and (ii) amend those proposed remedies "based upon the public input received" during the public hearings. (R.86). Finally, within 90 days of the date of the Resolution, the Town Board must "approve the completed NYVRA Proposal" and submit it to the Civil Rights Bureau of the State Attorney General's office for final approval. (R.86).

B. Plaintiffs File This Lawsuit And Defendants Move To Dismiss

On March 26, 2024—just 11 days after the Town Board adopted its Resolution—Plaintiffs filed their Complaint, alleging that the Town's at-large method of voting violates the NYVRA. (*See* R.70–72). Plaintiffs are the same six

Town residents named as clients in the Notification Letter from law firm Abrams Fensterman, LLP. (R.51; R.79).

Plaintiffs allege two causes of action. First, they assert that the Town Board's at-large method of election violates Section 17-206(2)'s prohibition against vote dilution because "Black and Hispanic voters consistently support certain candidates different from the candidates supported by non-Hispanic white voters," such that "Black and Hispanic voting preferences are polarized against the rest of the electorate." (R.70; R.57–58). Second, Plaintiffs allege that the Town Board's at-large method of election violates Section 17-206(2) because, "under the totality of the circumstances, [the at-large] system impairs the ability of Black and Hispanic voters residing within the Town to elect candidates of their choice or influence the outcome of elections." (R.71–72; *see also* R.58–69). Plaintiffs ask the Supreme Court to "declar[e] that the use of an at-large system to elect members of the Newburgh Town Board violates" Section 17-206, and "order[ ] the implementation . . . of a new method of election for the [ ] Town Board." (R.73). They also seek attorneys' fees and litigation expenses under Section 17-218. (R.73).

Regarding the timing of their lawsuit, Plaintiffs alleged that the Resolution was not a valid "NYVRA resolution" under Section 17-206(7)—and therefore did not trigger Section 17-206(7)'s 90-day safe-harbor period—for three reasons. First, the Resolution did not "commit[ ] the Town Board to any action other than to

consider [the] findings" concerning a potential violation. (R.56). Second, although the Resolution requires the "evaluation of the at-large system" to be submitted to the Board "within 30 days" of its passage, the Resolution "contains no 'schedule' by which the Town Board must act on" that evaluation and "instead giv[es] the Town Board an indefinite deliberation period." (R.56). And third, the Resolution was "not duly adopted at a duly called meeting of the Town Board." (R.56). Thus, Plaintiffs alleged that the Town "took no other action purporting to respond to the NYVRA notification letter within the 50-day period," (R.56), such that they were entitled to sue the Town on March 18, 2024—the first Monday following 50 days after sending the Notification Letter on January 26, 2024 (R.56–57).

On April 8, 2024, the Town Board adopted a new resolution in response to this lawsuit. *See* Resolution of the Town Board of the Town of Newburgh Pertaining to New York State Election Law 17-206 and Commencement of Litigation (Apr. 8, 2024) (the "April 8 Resolution");[4] *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, 20 (2d Dep't 2009) ("[M]aterial derived from official government Web sites may be the subject of judicial notice."). This April 8 Resolution reiterates the Town Board's "intention to enact and implement a remedy or remedies for a potential violation of the NYVRA." April 8 Resolution, *supra*, at 1. However, given

[4] Available at https://townofnewburgh.org/uppages/Resolution%20Pertaining%20to%20NYew%20York%20State%20Election%20Law%2017-206%20and%20Commencement%20of%20Litigation.pdf.

Plaintiffs' allegation in this lawsuit that the March 15 Resolution was invalid, the April 8 Resolution suspends the Town Board's schedule for implementing any remedy pending a determination from this Court as to whether the March 15 Resolution complies with the NYVRA. *Id.* at 3.

Defendants moved to dismiss on April 16, 2024. (R.20–21). In their motion, Defendants explained that Plaintiffs prematurely filed this lawsuit in violation of the NYVRA's mandatory 90-day safe-harbor provision. (R.22–41). Defendants further explained that because Plaintiffs violated the 90-day safe harbor, they should be required to wait until 90 days after dismissal of their lawsuit. (R.37).

IV. THE SUPREME COURT'S RULING

On May 17, 2024, the Supreme Court denied Defendants' motion to dismiss, (R.5–19), concluding that the March 15, 2024 Resolution did not trigger the 90-day safe harbor for three reasons. First, the Supreme Court found that the Resolution did not sufficiently obligate the Town Board to remedy a potential NYVRA violation because the Resolution provided that the Town Board would implement a remedy only "[i]f" it concluded, upon further investigation and information, that there was a violation in need of remedy. (R.15). Second, the Supreme Court held that the Resolution failed to provide "specific steps" the Town Board would undertake to "facilitate approval and implementation of [ ] a remedy," (R.17 (quoting N.Y. Elec. Law § 17-206(7)(b)), because the Resolution did not identify "an actual, defined

remedy," (R.17). Third, the Supreme Court determined that the Resolution failed to include a "schedule for enacting and implementing [ ] a remedy," again because the Resolution did not commit the Town Board to undertaking a specific remedy. (R.18). The Supreme Court then set an expedited discovery and briefing schedule, pursuant to which all discovery must be completed by August 16, 2024. NYSCEF No.29 at 3 (Index No.EF002460-2024; Orange Cnty.).

On May 24, 2024, Defendants filed a Notice of Appeal. (R.2–3). This Court denied Defendants' motion for a stay of proceedings before the Supreme Court pending this appeal, but granted their request for expedited briefing and a calendar preference. NYSCEF No.7 (Index No.2024-04378; 2d Dep't).

STANDARD OF REVIEW

This Court reviews a grant of a motion to dismiss *de novo*. *See Gulf Ins. Co. v. Transatlantic Reins. Co.*, 13 A.D.3d 278, 279 (1st Dep't 2004). A motion to dismiss is properly granted where the complaint's allegations, accepted as true, fail to state a claim for which relief may be granted. *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co*., 98 N.Y.2d 144, 151–52 (2002). A motion to dismiss for failure to state a claim is also properly granted where the plaintiff is legally barred from asserting its claim. *See, e.g.*, *Napolitano v. City of New York*, 12 A.D.3d 194, 194–95 (1st Dep't 2004); *see also Bickel v. Abramson*, 178 A.D.2d 138, 138 (1st Dep't 1991).

ARGUMENT

I. The Resolution Is A Valid NYVRA Resolution, And Plaintiffs Violated The NYVRA By Filing Their Lawsuit Prematurely

A. When interpreting statutes, New York courts aim "to ascertain the legislative intent and construe the pertinent statute[ ] to effectuate that intent." *In re M.B.*, 6 N.Y.3d 437, 447 (2006). "[T]he clearest indicator of legislative intent is the statutory text," and so "the starting point in any case of interpretation must always be the language itself." *People v. Golo*, 26 N.Y.3d 358, 361 (2015) (citation omitted). Courts must "construe words of ordinary import with their usual and commonly understood meaning," *Walsh v. New York State Comptroller*, 34 N.Y.3d 520, 524 (2019) (citation omitted), "unless the Legislature by definition or from the rest of the context of the statute provides a special meaning," *Lohan v. Take–Two Interactive Software, Inc.*, 31 N.Y.3d 111, 121 (2018). If the statutory language is ambiguous as to the Legislature's intent, courts must "look to the legislative history and circumstances surrounding enactment." *Civ. Serv. Emps. Ass'n, Inc. v. Oneida Cnty.*, 78 A.D.2d 1004, 1004 (4th Dep't 1980); *see also Riley v. Cnty. of Broome*, 95 N.Y.2d 455, 463–64 (2000) (courts may use all available aids when construing the meaning of words, including legislative history consisting of "the history of the times, the circumstances surrounding the statute's passage, and . . . attempted amendments" (citation omitted)).

Statutes are to be read "so as to give meaning to each word," *Skanska USA Bldg. Inc. v. Atl. Yards B2 Owner, LLC*, 146 A.D.3d 1, 9 (1st Dep't 2016), *aff'd*, 31 N.Y.3d 1002 (2018), and to "avoid an unreasonable or absurd" result, *Bank of Am., N.A. v. Kessler*, 39 N.Y.3d 317, 324 (2023) (citation omitted); *Ruttenberg v. Davidge Data Sys. Corp.*, 626 N.Y.S.2d 174, 177 (1995) (courts should avoid "unreasonable interpretation[s]" of contracts (citation omitted)). In construing a statute, courts must avoid any "construction rendering statutory language superfluous." *Branford House, Inc. v. Michetti*, 81 N.Y.2d 681, 687 (1993). Instead, courts adhere to the maxim "that every provision of a statute was intended to serve some useful purpose." *Tonis v. Bd. of Regents of Univ. of State of N.Y.*, 295 N.Y. 286, 293 (1946). And it "is always presumed in regard to a statute that no unjust or unreasonable result was intended by the Legislature," such that "if a particular application of a statute in accordance with its literal sense will produce or occasion injustice, another and more reasonable interpretation should be sought." *Cluett, Peabody & Co. v. J.W. Mays, Inc.*, 5 A.D.2d 140, 149 (2d Dep't 1958), *aff'd*, 6 N.Y.2d 952 (1959).

B. The Resolution here fully complied with Section 17-206(7)'s plain terms, entitling Defendants to the benefit of the NYVRA's 90-day safe harbor from litigation. To have the benefit of this safe harbor, the Town Board had to pass a NYVRA resolution within 50 days of the date on which Plaintiffs mailed the Notification Letter, "affirming: (i) the political subdivision's intention to enact and

implement a remedy for a potential violation of this title; (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy; and (iii) a schedule for enacting and implementing such a remedy." N.Y. Elec. Law § 17-206(7)(a)–(b). The Town Board passed the Resolution within the 50-day statutory period. (*See* R.56). That Resolution contains each of the three required elements for a NYVRA resolution, affirming the Town Board's intent to remedy any potential violation, laying out specific steps for doing so, and setting forth a schedule for when each of those steps will be completed. *See* N.Y. Elec. Law § 17-206(7)(b). Thus, Plaintiffs' lawsuit—which they filed prior to the expiration of the 90-day safe-harbor period—was unlawfully premature.

As an initial matter, the Resolution met the first prong of Section 17-206(7)(b), "affirming" the Town Board's "intention to enact and implement a remedy for a potential violation of" the NYVRA. *Id.* § 17-206(7)(b)(i). The meaning of the term "potential" is "possible if the necessary conditions exist." *Potential*, Black's Law Dictionary (12th ed. 2024). The NYVRA thus only requires the Town Board to affirm its intent to implement a remedy for a violation "if the necessary conditions exist," *id.*, that is, if the Town Board determines that the prospective plaintiff has set forth a NYVRA violation. The Resolution here expressly acknowledges that the Town Board "intends to proactively review the Town's current at-large election system for members of the Town Board in order to . . . enact or apply for approval,

as the case may be, and implement remedies for any potential violation of the NYVRA that may exist." (R.85). Consistent with Section 17-206(7)(b), the Resolution confirms that, should the Town Board deem a violation to exist following its investigation, the Town Board "intends to enact and implement the appropriate remedy(ies)." (R.86).

The Resolution also meets the second prong of Section 17-206(7)(b), setting forth several "specific steps" the Town Board "will undertake to facilitate approval and implementation of such a remedy." N.Y. Elec. Law § 17-206(7)(b)(ii). Given its ordinary meaning, the word "specific" means "[e]xactly named or indicated, or capable of being so; precise, particular." *Specific*, Oxford English Dictionary Online.[5] Here, the Resolution "name[s]" the "particular" steps the Town Board will take to implement a remedy. *See id.* It requires the Town's counsel and experts to investigate the Town's at-large election system for Town Board members "to determine whether any potential violation of the NYVRA may exist." (R.85). The Resolution also requires the Town's counsel and experts "to evaluate potential" remedies "should a potential violation be determined to exist." (R.85). Those investigative findings and evaluation must then be presented to the Town Board, (R.85–86), and if the Town Board concludes based on the findings that the Town's

[5] Available at https://www.oed.com/dictionary/specific_adj?tab=meaning_and_use#2165 4587 (subscription required).

current voting system is unlawful, the Town Board "shall" cause a NYVRA Proposal to be prepared and presented to the Town Board, (R.86). The Town Board must then hold at least two public hearings regarding the NYVRA Proposal, and during those hearings the public must "be invited to provide input regarding" the proposal and "the composition of proposed new election districts." (R.86). After the hearings, the Town Board must amend the NYVRA Proposal as appropriate to account for the public's input. (R.86). The Resolution then requires the Town Board to "approve the completed NYVRA Proposal" and submit it to the Civil Rights Bureau of the Office of the New York State Attorney General for final approval. (R.86).

The Resolution similarly satisfies the third prong of Section 17-206(7)(b), as it provides a "schedule for enacting and implementing [ ] a remedy" for any NYVRA violation. N.Y. Elec. Law § 17-206(7)(b)(iii). The term "schedule" means a "time-table," including "a programme or plan of events, operations, etc." *Schedule*, Oxford English Dictionary Online.[6] Section 17-206(7)(b)(iii)'s requirement that NYVRA resolutions contain "a schedule for enacting and implementing" a proposed remedy, N.Y. Elec. Law § 17-206(7)(b)(iii), therefore calls for the "program[ ]" of "operations," *Schedule*, Oxford English Dictionary Online, *supra*, necessary "for enacting and implementing" a remedial measure, N.Y. Elec. Law § 17-206(7)(b)(iii).

[6] Available at https://www.oed.com/dictionary/schedule_n?tab=meaning_and_use#24189809 (subscription required).

Here, the Resolution offers just such a schedule. If the Town Board makes a "finding that there may be a violation of the NYVRA," a NYVRA Proposal must be presented to the Town Board *within 10 days* of that finding. (R.86). The Town Board then has *30 days* to hold the public hearings and amend the NYVRA Proposal based upon the public's input. (R.86). The Town Board is then required to "approve the completed" NYVRA Proposal and submit it to the Civil Rights Bureau for final approval *within 90 days* of the date on which the Resolution was issued. (R.86).

C. Because Plaintiffs unlawfully deprived Defendants of the 90-day safe harbor, they must wait 90 days from the dismissal of this lawsuit before filing any of their NYVRA claims, should they continue to believe that such claims are justified after the Town's actions during that 90-day period.

Providing Defendants with a renewed 90-day safe harbor upon dismissal is the only result that is consistent with the NYVRA's statutory design. The Legislature crafted the NYVRA to encourage and facilitate a political subdivision's diligent efforts to address alleged NYVRA violations, *see* N.Y. Elec. Law § 17-200, and, to that end, the statute gives political subdivisions the right to a first chance at resolving a prospective plaintiff's allegations free from the distraction and expense of litigation, *see id.* § 17-206(b). If a prospective plaintiff can upend that statutory scheme by filing a premature lawsuit without also ensuring that the political subdivision receives a full 90-day safe-harbor period once the premature lawsuit is

dismissed, that would effectively nullify Section 17-206's safe-harbor provisions. Requiring prospective plaintiffs to abide by the NYVRA's 90-day safe harbor is thus necessary to respect a political subdivision's statutory safe-harbor rights and to prevent litigants from undermining the safe harbor's core design.

D. The Supreme Court's holding that the Resolution does not constitute a valid NYVRA resolution under Section 17-206(7)(b) cannot be reconciled with the statute's plain text or context.

The Supreme Court held that the Resolution was invalid under the NYVRA because it did not irrevocably pre-commit the Town to enacting a remedy for Plaintiffs' alleged NYVRA violations. (R.15). That holding is incorrect as a matter of law.

The Supreme Court's conclusion is wrong as a matter of plain text because its interpretation of Section 17-206(7)(b)(i) would impermissibly read "potential" out of the statute. *See Skanska*, 146 A.D.3d at 9; *Branford House*, 81 N.Y.2d at 687. In particular, the Supreme Court's holding fails to grapple with the plain terms of Section 17-206(7)(b)(i), which employ conditional language in setting forth the requirements for a political subdivision's affirmation of intent. *See* N.Y. Elec. Law § 17-206(7)(b)(i). That provision requires the political subdivision to affirm its "intention to enact and implement a remedy for a *potential* violation." *Id.* (emphasis added). As noted, the term "potential" means "possible *if* the necessary conditions

exist." *Potential*, Black's Law Dictionary, *supra* (emphasis added). By using the adjective "potential," Section 17-206(7)(b)(i) contemplates the possibility that a political subdivision may decide that there is no NYVRA violation, even after passing a NYVRA resolution. *See* N.Y. Elec. Law § 17-206(7)(b)(i). The Resolution here merely builds such a possibility into the requisite "steps" and "schedule" for implementing any remedy. *See id.* § 17-206(7)(b).

This is, moreover, the only conclusion that is consistent with the statutory context. Other of the NYVRA's provisions confirm that a political subdivision may satisfy Section 17-206(7)(b)(i) by affirming its intent to implement a remedy for any potential NYVRA violation, conditioned upon an investigation into the alleged violation. The statute identifies only one instance where a political subdivision is required to confirm its unconditional intent to remedy an alleged NYVRA violation: Section 17-206(7)(d) allows a "political subdivision that has passed a NYVRA resolution [to] enter into an agreement with the prospective plaintiff providing that" the plaintiff will not commence litigation "for an additional ninety days" beyond the initial 90-day safe harbor, but only if that agreement "*include[s] a requirement* that either the political subdivision *shall* enact and implement a remedy . . . or the political subdivision *shall* pass a NYVRA proposal and submit it to the civil rights bureau." *Id.* (emphases added). In other words, a political subdivision is only "require[d]" to enact and implement a remedy for an alleged NYVRA resolution to

avoid litigation for an "additional" 90 days. *Id*. If the Supreme Court were correct that a political subdivision must unconditionally pre-commit to remedying a merely *alleged* NYVRA violation in its NYVRA resolution, Section 17-206(7)(d)'s "requirement" language would be superfluous.

The Supreme Court's reading of Section 17-206(7)(b)(i) would also lead to unreasonable results that the Legislature could not have intended. *See Bank of Am.*, 39 N.Y.3d at 324; *Ruttenberg*, 626 N.Y.S.2d at 177. Under the Supreme Court's interpretation, political subdivisions must obtain counsel and other experts, analyze the factual and legal validity of the alleged NYVRA violation(s), decide whether the allegations are legally correct (that is, whether there is actually a NYVRA violation), determine whether the political subdivision plans to remedy the alleged violation(s), evaluate the potential remedies, choose a remedy, and adopt a NYVRA resolution—all in less than 50 days. *See* N.Y. Elec. Law § 17-206(7)(b). The statute does not require prospective plaintiffs to include any evidence in support of their allegations in the initiating NYVRA letter, *see generally id.*, which is precisely what happened here, *supra* pp.6–7. It could take several weeks for a municipality to even collect the data necessary to *begin* evaluating a prospective plaintiff's allegations, let alone determine the validity of those allegations—which is necessary if a political subdivision is going to select and implement a remedy for the alleged violation. The Supreme Court's interpretation of the NYVRA permits prospective plaintiffs to

deprive a political subdivision of its statutory right to avoid litigation by mailing a NYVRA notification letter that demands a fundamental change to a municipality's voting system without providing any factual support for why such a change is necessary or how it could be accomplished. (*See, e.g.*, R.79–83).

The NYVRA contains no extension for the less-than-50-day period in which a political subdivision may enact a NYVRA resolution, which provides further textual support for the conclusion that the Supreme Court's interpretation of Section 17-206(7)(b)(i) is unreasonable. If a municipality cannot definitively decide whether and how to remedy an alleged NYVRA violation in under 50 days, it is out of luck under the Supreme Court's reading of Section 17-206(7)(b)(i). Without any mechanism for providing political subdivisions additional time to decide whether to express an unconditional intent to remedy an alleged NYVRA violation, the 90-day statutory safe harbor becomes meaningless. *See Skanska*, 146 A.D.3d at 9. In contrast, permitting political subdivisions to "affirm[ ]" their "intention" to remedy a "potential" NYVRA violation, N.Y. Elec. Law § 17-206(7)(b)(i), contingent upon further investigation and a determination that there is a violation in need of remedy, ensures that any remedy is responsive to the prospective plaintiffs' allegations.

According to the Supreme Court, the NYVRA does not permit a political subdivision to investigate the prospective plaintiff's allegations and determine whether they are legally correct because "[o]nly the judiciary branch of government

has th[e] authority" to "make such a finding." (R.16). But a NYVRA resolution, like the Resolution here, in no way purports to authorize a municipality to make any sort of *judicial* determination as to whether the Town's at-large method of elections violates the NYVRA. (*See* R.84–91). The Resolution simply authorizes the Town Board to investigate and come to its *own* legally conclusion as to whether it is violating the NYVRA. (R.85–86). The Supreme Court's assertion that a municipality may not, when assessing a NYVRA notification letter, make any determination as to whether the prospective plaintiff has stated a viable NYVRA violation is wrong, where the NYVRA provides the municipality an opportunity to remedy the alleged violation without any judicial intervention. *See* N.Y. Elec. Law § 17-206(7)(b).[7]

The legislative history that the Supreme Court relies upon does not support its conclusion either. (*See* R.16–17). The Supreme Court itself noted that the legislative history here "provides little guidance" on the meaning of Section 17-206(7)(b)(i). (R.17). The Supreme Court quotes from the sponsor's memorandum on Subsection

[7] The Supreme Court's confusing focus on the tense in which the Resolution is drafted is also misguided, (*see* R.16), where the Resolution's use of present tense is simply responsive to Plaintiffs' Notification Letter, which asserts—in the present tense—that "the Town's current method of electing Town Council Members, by at-large elections, *violates* the [NYVRA]," (R.79) (emphasis added). None of the parties assigned any relevance below to the tense in which the Resolution is written, and the Supreme Court failed to explain why the tense in which a resolution is drafted is at all relevant to whether such a resolution is a valid NYVRA resolution under Section 17-206(b).

7, which states that the bill "contains notification requirements and provides a safe harbor for judicial actions. So that political jurisdictions can make necessary amendments to proposed election changes without needing to litigate in court." (R.17) (quoting S.B. S1046E, 2021–2022 S., Gen. Sess. (N.Y. 2021)). The text of the NYVRA says nothing at all about "mak[ing] necessary amendments to proposed election changes," and the sponsor's memorandum does not otherwise indicate that a political subdivision must state an unconditional intent to remedy an alleged NYVRA violation in enacting a NYVRA resolution. (*See* R.17). In any event, the Resolution does in fact already contemplate a period for amending the NYVRA Proposal following public comment. (R.86).

As for the second and third prongs of Section 17-206(7)(b), the Supreme Court's reasoning mirrored its flawed analysis of Section 17-206(7)(b)(i). According to the Supreme Court, because the Resolution did not pre-commit the Town to an "actual, defined remedy," (R.17), it also could not set forth "specific steps" to implement any remedy under Section 17-206(7)(b)(ii), or a "schedule" for implementing such remedy under Section 17-206(7)(b)(iii), (R.17–18). Again, the Supreme Court incorrectly articulated the statutory regime.

With respect to Section 17-206(7)(b)(ii), that provision merely requires a NYVRA resolution to set forth the "*specific steps* the political subdivision will undertake to facilitate approval and implementation of such a remedy," N.Y. Elec.

Law § 17-206(7)(b)(ii) (emphasis added), and nowhere purports to require that a political subdivision enumerate any "actual, defined remedy" in its NYVRA resolution. (*Contra* R.17). Had the Legislature intended such a result, it could have called for the enumeration of a "specific" or "particular" remedy, and its decision to call for "specific steps" without modifying or qualifying the "remedy" in the same statutory sentence demonstrates an intentional distinction that must be given effect. *See Skanska*, 146 A.D.3d at 9; *Tonis*, 295 N.Y. at 293. Further, and as explained above, such a requirement would be unreasonable, requiring a political subdivision to pre-commit to a specific remedy without first having the opportunity to analyze the prospective plaintiff's allegations to determine if they are meritorious. *See supra* pp.22–23.

As to Section 17-206(b)(7)(iii), the Supreme Court's conclusion that a political subdivision "cannot create a schedule for a remedy if [it] has not yet decided upon the remedy," (R.18), is equally misguided. This reasoning again rests on the erroneous assumption that Section 17-206(7)(b) calls for a municipality to pre-commit to some "actual, defined" remedy. *See supra* pp.20–25. It is plainly possible for a political subdivision to create a "schedule" for purposes of Section 17-206(7)(b)(iii) without first "decid[ing] upon" an "actual, defined remedy." (*Contra* R.17–18). Here, the Resolution enumerates the "specific steps" that it will take to "enact and implement" a "remedy," N.Y. Elec. Law § 17-

206(7)(b)(iii), and provides deadlines for each of those "steps," as well as a final deadline for the actual implementation of that remedy if necessary, whatever the selected remedy may ultimately be. Specifically, the Resolution sets forth specific deadlines for investigating Plaintiffs' allegations, passing a NYVRA Proposal, holding public hearings, making any necessary amendments to the NYVRA Proposal, and submitting the NYVRA Proposal to the State for final approval—all of which steps much be completed within 90 days of the date on which the Resolution is issued. (R.85–86). The enumeration of these specific steps and deadlines refutes the Supreme Court's apparent belief that the Resolution's schedule "concerns [only] the Defendants' timetable for investigating whether a violation of the Act may be occurring." (R.18).

CONCLUSION

This Court should reverse the Supreme Court and remand for dismissal of Plaintiffs' lawsuit.

Dated: July 17, 2024

Respectfully submitted,

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STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT

Docket No.
2024-04378

ORAL CLARKE, ROMANCE REED, GRACE PEREZ, PETER RAMON, ERNEST TIRADO, and DOROTHY FLOURNOY,

Plaintiffs-Respondents,

against

TOWN OF NEWBURGH and
TOWN BOARD OF THE TOWN OF NEWBURGH,

Defendants-Appellants.

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1. The index number of the case in the Court below is EF002460/2024.
2. The full names of the original parties are set forth above. There has been no change to the caption.
3. The action was commenced in the Supreme Court, Orange County.
4. This action was commenced on or about March 26, 2024, by the filing of a Summons and Verified Complaint. Issue was joined by service of an Answer on or about May 28, 2024.
5. The nature and object of the action: to enforce the requirements of the John R. Lewis Voting Rights Act of New York.
6. The appeal is from the Decision and Order of the Honorable Maria S. Vazquez-Doles, dated May 17, 2024.
7. This appeal is being perfected with the use of a fully reproduced Record on Appeal.

98 N.Y.2d 144
Court of Appeals of New York.

511 WEST 232ND OWNERS CORP. et al., Respondents,
v.
JENNIFER REALTY CO. et al., Appellants.

68, 1
|
June 10, 2002.

Synopsis

Board of directors of cooperative corporation and its shareholders sued cooperative's sponsor, seeking to compel sale of unsold units. The Supreme Court, Bronx County, Jerry L. Crispino, J., granted sponsor's motion to dismiss breach of contract claim, and appeal was taken. The Supreme Court, Appellate Division, 285 A.D.2d 244, 729 N.Y.S.2d 34, affirmed as modified, and appeal was taken. The Court of Appeals held that plaintiffs' allegations were sufficient to state claim for breach of contract.

Affirmed.

Attorneys and Law Firms

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OPINION OF THE COURT

ROSENBLATT, J.

Pursuant to the Martin Act (General Business Law article 23–A), the owner of ***133 **498** an apartment building may

sponsor an offeringplan ***150** to convert the building into a cooperative. Such conversions are subject to a complex statutory and regulatory scheme that governs the form and content of public offerings, public disclosure, advertising and criteria for determining when such a conversion becomes effective.[1] On this appeal, plaintiffs (the board of directors of the cooperative corporation and a number of individual shareholders and proprietary lessees) allege that the sponsor breached its contracts with them by retaining most of the shares in the cooperative after the effective date of the conversion. The central question before us is whether plaintiffs have sufficiently pleaded a cause of action for breach of contract. We conclude that they have. The complaint recites that in 1974, defendant Arthur Wiener acquired the subject 66–unit rent-regulated apartment building located at 511 West 232nd Street in The Bronx and transferred it to codefendant Jennifer Realty Co., a partnership in which Wiener and his named codefendants are principals. (We refer to defendants collectively as the sponsor.) Having obtained permission from the Attorney General in 1987 to convert to a cooperatively-owned building under a noneviction plan,[2] the sponsor began accepting offers for shares. After receiving offers for 15% of the shares (a prerequisite under the Martin Act for effectuating a noneviction conversion), the sponsor filed documentation with the Attorney General declaring the offering plan effective as of May 16, 1988 (*see* General Business Law § 352–eeee [1][b]; [2][c][i]; 13 NYCRR 18.3[r][1]). The sponsor then incorporated 511 West 232nd Owners Corp. (the Co-op Board), sold the building to the Co-op Board and acquired the as-yet unsold shares.

It is undisputed that the sponsor has sold no shares since 1990. Instead, the sponsor has kept more than 62% of shares in the building, corresponding to 41 of the 66 apartments. ***151** Moreover, in 1996 the sponsor ceased updating its offering plan, causing it to lapse. As a result, the sponsor was prohibited from selling or marketing shares (*see* General Business Law § 352–e [2], [5]; 13 NYCRR 18.3[r][11]; [w][11]). According to the complaint, in 1998 the tenant-owners learned that the sponsor had rejected bona fide purchase offers from prospective purchasers of vacant apartments.

The tenant-owners and the Co-op Board brought this action against the sponsor, asserting that the sponsor had breached its contractual duty to dispose of all its shares within a reasonable time. The sponsor moved to dismiss, asserting a defense founded upon documentary evidence (*see* CPLR 3211[a][1]). In deciding the motion, Supreme Court dismissed the contract claim, finding that the offering plan contained no promise by the sponsor to sell unsold shares within any particular time frame. The Appellate Division reinstated the contract cause of action, holding *****134 **499** that the sponsor's offering plan included an implied promise to sell all unsold units within a reasonable time (285 A.D.2d 244, 729 N.Y.S.2d 34 [2001]). The Appellate Division then granted the sponsor leave to appeal and certified the question, "Was the order of this Court, which modified the order of the Supreme Court, properly made?" (287 A.D.2d 947, 735 N.Y.S.2d 746 [2001].)[3]

We hold that plaintiffs have pleaded a cause of action for breach of contract sufficient to survive dismissal under CPLR 3211, and affirm the order of the Appellate Division. Our analysis, however, differs from the Appellate Division's in that we address only the sufficiency of the contract cause of action as opposed to its merits.

In the posture of defendants' CPLR 3211 motion to dismiss, our task is to determine whether plaintiffs' pleadings state a ***152** cause of action. The motion must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Polonetsky v. Better Homes Depot,* 97 N.Y.2d 46, 54, 735 N.Y.S.2d 479, 760 N.E.2d 1274 [2001], quoting *Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 [1977]). In furtherance of this task, we liberally construe the complaint (*see e.g. Leon v. Martinez,* 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]; CPLR 3026), and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion (*see Sokoloff v. Harriman Estates Dev. Corp.,* 96 N.Y.2d 409, 414, 729 N.Y.S.2d 425, 754 N.E.2d 184 [2001] [collecting cases]; *Wieder v. Skala,* 80 N.Y.2d 628, 631, 593 N.Y.S.2d 752, 609 N.E.2d 105 [1992]). We also accord plaintiffs the benefit of every possible favorable inference (*see Sokoloff,* 96 N.Y.2d at 414, 729 N.Y.S.2d 425, 754 N.E.2d 184). Dismissal under CPLR 3211(a)(1) is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon,* 84 N.Y.2d at 88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *see generally* Siegel, N.Y. Prac § 269, at 428 [3d ed]).

Based on the foregoing principles, we conclude that plaintiffs' complaint sufficiently alleged, at a minimum, that the sponsor undertook a duty in good faith to timely sell so many shares in the building as necessary to create a fully viable cooperative. The complaint asserts that the sponsor—by its initial offering plan and each of its 10 periodic amendments—offered for sale the shares in the cooperative corresponding to its 66 apartments, but instead retained a majority of those shares. The complaint narrates that the *****135 **500** sponsor had represented that its expected profits would depend on market conditions and the length of time required to sell shares offered under the offering plan, but gave no

hint that it would make a sizeable profit by retaining a majority of those shares and leasing apartments at market rates, free of the strictures of rent regulation. Similarly, the complaint states that the offering plan cautioned purchasers as to numerous investment risks, but did not mention the risk that the sponsor would keep most of the shares for itself. Based primarily on these allegations, plaintiffs assert that the parties could not have intended—and plaintiffs could not reasonably anticipate—that the sponsor would retain a majority of shares in the cooperative.

Moreover, the complaint alleges that by keeping a majority of shares, the sponsor defeated the purpose of the contract. Plaintiffs assert that by rejecting offers from prospective buyers and allowing its offering plan to lapse, the sponsor frustrated plaintiffs' ability to resell their shares, interfered with the Co-op Board's refinancing of the building's mortgage ***153** and caused shareholders' maintenance payments to increase. The complaint elaborates on how the sponsor's retention of a majority of shares discouraged private lenders from offering reasonable financing terms (insisting instead on higher interest rates and shorter maturity dates), and that these financing difficulties impaired the tenant-owners' ability to resell their apartments at market rates. The complaint also claims that because most of the apartments are still rented rather than owner-occupied, many transient tenants live in the building, causing it increased wear and tear and thus forcing the Co-op Board to charge even higher monthly maintenance fees. Finally, the complaint avers that as former rent-regulated tenants, plaintiffs surrendered their rights pursuant to the Rent Stabilization Code by purchasing shares, but now pay more in monthly maintenance and cooperative loan payments than they had paid in rent as tenants. In sum, plaintiffs allege that the sponsor's retention of shares so drastically undermined the contract that its fundamental objective—the creation of a viable cooperative—has been subverted.

Because the sponsor's documentary evidence does not clearly refute these assertions, and particularly in light of the sponsor's duty imposed by the Attorney General not to abandon the offering plan after filing an effectiveness amendment (*see* 13 NYCRR 18.3[r][11]), we conclude that defendants' CPLR 3211 motion to dismiss must fail.

In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance (*see e.g. Smith v. General Acc. Ins. Co.,* 91 N.Y.2d 648, 652–653, 674 N.Y.S.2d 267, 697 N.E.2d 168 [1998]; *Dalton v. Educational Testing Serv.,* 87 N.Y.2d 384, 389, 639 N.Y.S.2d 977, 663 N.E.2d 289 [1995]; *Van Valkenburgh, Nooger & Neville v. Hayden Publ. Co.,* 30 N.Y.2d 34, 45, 330 N.Y.S.2d 329, 281 N.E.2d 142, *rearg. denied* 30 N.Y.2d 880, 335 N.Y.S.2d 1029, 286 N.E.2d 740, *cert. denied* 409 U.S. 875, 93 S.Ct. 125, 34 L.Ed.2d 128 [1972]). This covenant embraces a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Dalton,* 87 N.Y.2d at 389, 639 N.Y.S.2d 977, 663 N.E.2d 289, quoting *Kirke La Shelle Co. v. Armstrong Co.,* 263 N.Y. 79, 87 [1933]). While the duties of good faith and fair dealing do not imply obligations "inconsistent with other terms of the contractual relationship" *****136 **501** (*Murphy v. American Home Prods. Corp.,* 58 N.Y.2d 293, 304, 461 N.Y.S.2d 232, 448 N.E.2d 86 [1983]), they do encompass "any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (*Rowe v. Great Atl. & Pac. Tea Co.,* 46 N.Y.2d 62, 69, 412 N.Y.S.2d 827, 385 N.E.2d 566 [1978], quoting 5 Williston, Contracts § 1293, at 3682 [rev ed 1937]). This is particularly true in cooperative conversions, ***154** whose sponsors must meet "high standards of fair dealing and good faith toward tenants" because "purchasing tenants and sponsors do not deal as equals either in terms of access to information or business acumen and thus, tenants often lack equal bargaining power" (*Vermeer Owners v. Guterman,* 78 N.Y.2d 1114, 1116, 578 N.Y.S.2d 128, 585 N.E.2d 377 [1991] [collecting cases]).

By spelling out the basis for their claim that the sponsor failed to exercise good faith and deal fairly in fulfilling the terms and promises contemplated by the offering plan, plaintiffs pleaded a valid cause of action for breach of contract. Specifically, plaintiffs pleaded that they reasonably understood the offering plan to state a duty, at the very least, to sell a sufficient number of shares in a timely manner so as to create a viable cooperative. We emphasize, however, that we address only the sufficiency of the contract cause of action and not its merits. We note that the Appellate Division went so far as to hold that the sponsor had undertaken a duty to dispose of the units within a reasonable time. The Court thus decided that issue and left open only the question of whether the sponsor's 10–year delay was reasonable. At this preanswer stage of the litigation, we need not reach the merits of plaintiffs' contract cause of action and therefore do not address the issue of whether, as alleged, the sponsor impliedly promised to sell all its unsold shares. We hold only that plaintiffs' contract cause of action withstands the sponsor's CPLR 3211 motion to dismiss.

We have reviewed defendants' remaining contentions and find them without merit.

Accordingly, the order of the Appellate Division, insofar as appealed from, should be affirmed, with costs, and the certified question answered in the affirmative.

Chief Judge KAYE and Judges SMITH, LEVINE, CIPARICK, WESLEY and GRAFFEO concur.

Opinion

Order, insofar as appealed from, affirmed, etc.

All Citations

98 N.Y.2d 144, 773 N.E.2d 496, 746 N.Y.S.2d 131, 2002 N.Y. Slip Op. 04809

Footnotes

1 *See generally* General Business Law §§ 352–e—352–eeee; 13 NYCRR part 18; Goldsmith, "Real Estate Financing," Practice Commentaries, McKinney's Cons Laws of NY, Book 19, General Business Law art 23–A, at 89–116; Levinson, *Real Estate Investments, Public Offerings, and the New York Real Estate Syndicate Act* (57 St. John's L Rev 662 [1983]); Maccaro, *Cooperative Conversions and Apartment Warehousing* (63 N.Y. St B J 30 [1991]).

2 Noneviction plans prohibit sponsors from evicting tenants merely because they refused to purchase shares in the cooperative (*see* General Business Law § 352–eeee [2][c][ii]). By contrast, an "eviction plan" allows the sponsor to evict certain nonpurchasing tenants after the plan becomes effective (*see* General Business Law § 352–eeee [2][d][ii]-[iii]).

3 [2] At the outset, we note a jurisdictional limitation on the scope of this appeal. Plaintiffs and plaintiffs' amici, including the Attorney General, argue that the Attorney General does not have exclusive jurisdiction to prosecute Martin Act violations and that the Appellate Division erred in holding that plaintiffs had no standing to prosecute their fraud causes of action. Plaintiffs also argue that the Appellate Division wrongly dismissed the complaint's fraud claims as duplicative of the contract claims. These issues are beyond this Court's review because plaintiffs failed to cross-move for leave to appeal. We will generally deny affirmative relief to a nonmoving party (*see Hecht v. City of New York,* 60 N.Y.2d 57, 61–62, 467 N.Y.S.2d 187, 454 N.E.2d 527 [1983]), even where the Appellate Division broadly certifies the propriety of its order for review by this Court (*see Graubard Mollen Dannett & Horowitz v. Moskovitz,* 86 N.Y.2d 112, 118 and n. 2, 629 N.Y.S.2d 1009, 653 N.E.2d 1179 [1995]). An exception exists only for cases where granting relief to a nonappealing party is necessary to give meaningful relief to the appealing party (*see Cover v. Cohen,* 61 N.Y.2d 261, 277–278, 473 N.Y.S.2d 378, 461 N.E.2d 864 [1984]; *Hecht,* 60 N.Y.2d at 62, 467 N.Y.S.2d 187, 454 N.E.2d 527).

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39 N.Y.3d 317
Court of Appeals of New York.

BANK OF AMERICA, N.A., Appellant,
v.
Andrew KESSLER, Respondent, et al., Defendants.

No. 4
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Decided February 14, 2023

Synopsis

Background: Lender commenced action against borrower to foreclose mortgage and subsequently moved for summary judgment. Borrower cross-moved to dismiss on the basis that lender violated "separate envelope" provision of statute requiring 90-day notice prior to commencement of action with regard to home loan. The Supreme Court, Westchester County, Alan D. Scheinkman, J., 2017 WL 11655503, denied lender's motion, granted borrower's cross-motion, and dismissed complaint. Lender appealed. The Supreme Court, Appellate Division, Duffy, J., 202 A.D.3d 10, 160 N.Y.S.3d 277, affirmed, granted leave to appeal, and certified question of whether its order was properly made. Lender appealed.

Holdings: The Court of Appeals, Wilson, J., held that:

a lender's inclusion of concise and relevant additional information does not void an otherwise proper pre-foreclosure 90-day notice to borrowers sent pursuant to the Real Property Actions and Proceedings Law (RPAPL), and

in the present case, lender's inclusion of information concerning bankruptcy status and military membership did not violate "separate envelope" provision of statute.

Ordered accordingly.

Attorneys and Law Firms

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OPINION OF THE COURT

WILSON, J.

***321 **1231 ***88** The question presented here is whether the inclusion of concise and relevant additional information voids an otherwise proper notice to borrowers sent pursuant to Real Property Actions and Proceedings Law § 1304, thus barring a subsequently filed foreclosure action. We hold that it does not.

I.

As a result of the "Great Recession" of 2007–2009, an estimated 6 million Americans lost their homes (Tomasz Piskorski & Amit Seru, *Debt Relief and Slow Recovery: A Decade After Lehman,* Working Paper 25403, National Bureau of Economic Research [December 2018], available at https://www.nber.org/papers/w25403 [last accessed Jan. 17, 2023]). In the midst of that crisis, both chambers of the New York State Legislature voted unanimously to enact Governor Paterson's Program Bill (2008 N.Y. Senate Bill S 8143–A, enacted as L 2008, ch 472), a portion of which is codified in RPAPL 1304. Section 1304(1) requires a "lender, assignee, or mortgage loan servicer" to send a notice 90 days before it may "commence[ ] legal action against [a] borrower." That notice "shall include" several pages of specific text set out in that subdivision. The prescribed template requires the lender to fill in certain information, including:

- How many days the borrower is in default;
- The total amount of the missed payments, penalties, and interest;
- A list of (five)government-approved housing counseling agencies in the borrower's area that ***322** provide free counseling, along with the explanation that the counselors are trained to help homeowners who are having problems making their mortgage payments;
- An encouragement to take immediate steps to try to achieve a resolution, with the disclaimer that the lender cannot assure a mutually agreeable resolution is possible;
- A warning that if the borrower fails to act within 90 days (or sooner if the borrower ceases to live in the home as the borrower's primary residence), the lender may commence legal action;
- A notification that the borrower has the right to remain in the home until the borrower receives a court order requiring the borrower to vacate; and
- A statement that the enclosure is not a notice of eviction (RPAPL 1304[1]).

Section 1304 (2), added by the legislature in 2009 (*see* L 2009, ch 507, § 1–a), provides *****89** that "the notices required by this section shall be sent ... in a separate envelope from any other mailing or notice."[1]

Section 1304 was enacted to address the pre-foreclosure "lack of communication" between borrower and lender, which "often leads to needless foreclosure proceedings in cases where a foreclosure alternative might otherwise have been possible" (Senate Introducer's Mem in Support, Bill Jacket, L 2008, ch 472 at 10). The Senate Sponsor further explained that the required 90–day notice "urges borrowers to work with their lender or a housing counseling agency to address their situation," ****1232** so as to "provide an opportunity for borrowers and lenders to try to reach a solution that avoids foreclosure" (Letter from Senator Hugh T. Farley to Kristin Rosenstein, July 31, 2008, Bill Jacket, L 2008, ch 472 at 6). However, section 1304 was not intended to extinguish a lender's right to foreclose: "if the borrower is unable to reach resolution with the lender in

the prescribed time, the lender will have the opportunity to pursue legal action against the borrower" (*id.*).

***323** In 2009, Mr. Kessler obtained a loan secured by a mortgage on his home.[2] In September 2013, he defaulted on the loan, and has made no payments on it since. Following his default, Bank of America sent a notice to Mr. Kessler pursuant to RPAPL 1304. It is undisputed that Mr. Kessler received a seven-page notice containing all of the language required by the statute. However, the last page of the notice included the following language, not found in section 1304:

> "Bank of America, N.A., the servicer of your home loan, is required by law to inform you that this communication is from a debt collector.[3]
>
> "If you are currently in a bankruptcy proceeding, or have previously obtained a discharge of this debt under applicable bankruptcy law, this notice is for information only and is not an attempt to collect the debt, a demand for payment, or an attempt to impose personal liability for that debt. You are not obligated to discuss your home loan with us or enter into a loan modification or other loan-assistance program. You should consult with your bankruptcy attorney or other advisor about your legal rights and options.
>
> "MILITARY PERSONNEL/SERVICEMEMBERS: If you or your spouse is a member of the military, please contact us immediately. The federal Servicemembers Civil Relief Act and comparable state laws afford significant protections and benefits to eligible military service personnel, including protections from foreclosure as well as interest rate relief. For additional information and to determine eligibility please contact our Military Assistance Team toll free at 1–877–430–5434. If you are calling from outside the U.S., please contact us at 1–817–685–6491." (Emphasis omitted.)

*****90** In 2017, Bank of America moved for summary judgment against Mr. Kessler. Mr. Kessler cross-moved to dismiss, arguing ***324** that the inclusion of the final two paragraphs in his notice, addressing bankruptcy status and military membership, violated section 1304's "separate envelope" provision. Supreme Court agreed and dismissed the complaint (*see* 2017 N.Y. Slip 33343[U], 2017 WL 11655503 [Sup. Ct. Westchester County 2017]). The Appellate Division affirmed on the same ground, holding that including in the envelope sent to the borrower any language not required by the statute violates its separate envelope provision (*see* 202 A.D.3d 10, 160 N.Y.S.3d 277 [2d Dept. 2021]). The Appellate Division granted leave to appeal and certified the question of whether its order was properly made (*see* 2022 N.Y. Slip Op. 66274[U], 2022 WL 1632016 [2d Dept. 2021]).[4]

****1233** II.

On this appeal, Bank of America challenges only the acceptance of the RPAPL 1304 defense by the courts below. In interpreting any statute,

> "our goal is to give force to the intent of the legislature and we therefore begin with the plain text—the clearest indicator of legislative intent. In a manner consistent with the text, we may look to the purpose of the enactment and the objectives of the legislature. We must also interpret a statute so as to avoid an unreasonable or absurd application of the law" (*see Lubonty v. U.S. Bank N.A.,* 34 N.Y.3d 250, 116 N.Y.S.3d 642, 139 N.E.3d 1222 [2019] [internal quotation marks and citations omitted]).

The operative statutory language here contains two requirements: (1) the notice "shall include" the specified language and information; and (2) the notice must be sent "in a separate envelope from any other mailing or notice" (RPAPL 1304[1], [2]). As to the first requirement, subdivision (1) does not say that the notice must state *only* the cautionary language set forth in the statute, but rather that the notice "shall include" that language. Where the "natural signification of the words employed" "ha[s] a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add or take away from that meaning" (*Tompkins v. Hunter,* 149 N.Y. 117, 122–123 [1896]). The word "include" suggests that more can be added to the notice. ***325** As we explained in *Red Hook Cold Stor. Co. v. Department of Labor of State of N.Y.,* " '[i]ncluding' may be used to bring into a definition something that would not be there unless specified, or it may be used to show the meaning of the defined word by listing some of the things meant to be referred to, but not by such listing excluding others of the same kind" (295 N.Y. 1, 8, 64 N.E.2d 265 [1945]). Here, the notice indisputably contains all of the mandatory language set forth in the version of section 1304(1) in effect at the time Bank of America commenced this

action. The statute says that the notice "shall include" certain information; the notice here does so.

The question then is the constraint imposed by the requirement that the envelope not contain "any *other* mailing or notice." The bright line rule adopted by the lower courts effectively defines "any other mailing or notice" as ***91** "any additional material or information whatsoever." Although it might be possible to read "other notice" as the lower courts did—such that any deviation from the statutory language, however minor, would void the notice—that interpretation would stand in great tension with "shall include," a phrase that contemplates the addition of something else. The statute must be given "a sensible and practical over-all construction, which ... harmonizes all its interlocking provisions" (*Matter of Long v. Adirondack Park Agency,* 76 N.Y.2d 416, 420, 559 N.Y.S.2d 941, 559 N.E.2d 635 [1990]). Application of a bright line rule here would require the use of a highly constrained definition of "other," where it is more appropriately read to mean mailings or notices "of a different kind." Here, "other mailing or notice" more aptly refers other kinds of notices, such as pre-acceleration default notices, notices disclosing interest rate changes to borrowers with adjustable-rate mortgages (12 CFR 1026.20[c]), monthly mortgage statements (12 CFR 1026.41), or notices disclosing to the borrower a transfer of the loan servicer (12 CFR 1024.33[b]) (*cf.* ***1234** *People v. First Meridian Planning Corp.,* 86 N.Y.2d 608, 619, 635 N.Y.S.2d 144, 658 N.E.2d 1017 [1995] [rejecting a narrow interpretation of "other securities" when such a reading "would conflict with the general remedial purposes of the securities laws"]).

A bright-line rule would also lead to nonsensical results. For example, had Bank of America sent the required statutory language verbatim, but added, "THIS IS EXTREMELY IMPORTANT, PLEASE PAY ATTENTION!", a bright-line rule would require that the notice be deemed void and the foreclosure action dismissed. Indeed, Mr. Kessler's failure to challenge either **326** the inclusion of the Fair Debt Collection Practices Act (FDCPA) disclaimer or the minor variations in the statutory language (discussed *supra* n 3) stands as a tacit recognition that the notice need not consist exclusively of the statutory text.

More importantly, to the extent there is any ambiguity about how to interpret the statute, application of a bright-line rule would contravene the legislative purpose. RPAPL 1304 is a remedial statute that should be read broadly to help borrowers avoid foreclosure. In expanding the protections of RPAPL 1304 to all home loans, the legislature sought to reduce the number of foreclosures by allowing the parties to "attempt to work out the default 'without imminent threat of a foreclosure action' " (*CIT Bank N.A. v. Schiffman,* 36 N.Y.3d 550, 555, 145 N.Y.S.3d 1, 168 N.E.3d 1138 [2021], quoting Governor's Program Bill Mem No. 46R, Bill Jacket, L 2009, ch 507 at 10; *see also* Letter from Mayor of City of NY, Nov. 20, 2009, Bill Jacket, L 2009, ch 507 at 13 [noting that the bill was a "significant reform in ensuring that homeowners and tenants are aware of their rights upon being faced with the threat of foreclosure"]). Prohibiting lenders from concisely informing borrowers of additional rights they may have to avoid foreclosure is manifestly at odds with that purpose.

Thus, we hold that accurate statements that further the underlying statutory purpose of providing information to borrowers that is or may become relevant to avoiding foreclosure do not constitute an "other notice." The statutorily required language informs borrowers that they are at risk of losing their homes because they are in default. It warns them that the lender may commence foreclosure proceedings if they fail to take any action to resolve the default within ninety days. It assures them that they have the right to remain in their home until they receive a ***92** court order telling them to leave the property. It provides them with the contact information for housing counseling agencies. The subject matter of the mandated language is thus a disclosure to the borrower of 1) the possibility of foreclosure, 2) the borrower's rights, and 3) the options available to the borrower to attempt to remedy the situation. That language serves the express statutory purpose of providing borrowers with information that may help them avoid foreclosure during a 90–day window established by that statute.

Here, the additional two paragraphs are directly related to the notice's subject matter and further the statutory purpose by informing certain borrowers of additional protections they **327** may have beyond those identified in the statutory notice language. The paragraphs relate to and supplement the statutory language as applied to two distinct groups of borrowers, and thus make most sense and are most helpful when read together with the notice. In addition, the paragraph relating to bankruptcy proceedings may be particularly useful to avoid confusing borrowers who are subject to the automatic stay in bankruptcy court and to avoid potential violation of such stays by the lender (*see* ***1235** *In re Ho,* 624 B.R. 748, 752–753 [Bankr. E.D.N.Y.2021] [holding bankruptcy disclosure a relevant factor in determining 90–day notice did not violate an injunction against proceeding against discharged debt]). The added language is specifically directed at that concern: it states that if the borrower is in bankruptcy, the section 1304 notice "is for information only and is not an attempt to collect the debt, a demand for payment, or an attempt to impose personal liability for that debt." It thus functions as both a protection for

lenders and an explanation to borrowers of additional rights they may have. Moreover, a bright-line rule against any additional language in the same envelope could conflict with certain disclosure requirements under federal law (*see e.g. CIT Bank, N.A. v. Neris,* 605 F.Supp.3d 521 [S.D.N.Y.2022]; *see also supra* n 3, discussing the inclusion of an FDCPA warning in the notice at issue here).

III.

The Appellate Division's concern that a case-by-case analysis of section 1304 notices would involve "exactly the type of judicial scrutiny" of mortgage foreclosure correspondence that we rejected in (*Freedom Mtge. Corp. v. Engel,* 202 A.D.3d at 17, 160 N.Y.S.3d 277, citing 37 N.Y.3d 1, 146 N.Y.S.3d 542, 169 N.E.3d 912 [2021]) is misplaced.[5] In *Engel,* we held that acceleration of the mortgage debt is revoked by a voluntary discontinuance of a foreclosure action; we adopted that bright-line rule to avoid "an exploration into the bank's intent, accomplished through an exhaustive examination of post-discontinuance acts" (*id.* at 30, 160 N.Y.S.3d 277). Determining whether additional language in a section 1304 notice is permissible requires no examination of intent or extrinsic evidence, but rather an objective facial determination of the language's relevance, truth, falsity, or potential to mislead or confuse.

***328** By contrast, in *CIT Bank N.A. v. Schiffman,* we held that lenders could prove mailing of a section 1304 notice by submitting either evidence of actual mailing or "proof of a sender's routine business practice with respect to the creation, addressing, and mailing of documents of that nature" (36 N.Y.3d at 556, 145 N.Y.S.3d 1, 168 N.E.3d 1138). Instead of a bright-line *****93** rule, we adopted "a workable rule that balances the practical considerations underpinning the presumption [established by proof of a sender's routine business practice] against the need to ensure the reliability of [that practice] ... in the context of notices mailed pursuant to section 1304" (*id.* at 558, 145 N.Y.S.3d 1, 168 N.E.3d 1138).

Consistent with our approach in *Schiffman,* we hold that section 1304 does not prohibit the inclusion of additional information that may help borrowers avoid foreclosure and is not false or misleading. This is a workable rule that balances the practical considerations of the lender and borrower in a way that best advances the clear statutory purpose. Where a lender includes false, misleading, obfuscatory, or unrelated information in the envelope together with the 1304 notice, courts may void such notices. But where, as here, the additional information was not false, misleading, obfuscatory, or unrelated, it should not render the notice void. A bright-line rule would be both unfair and contrary to the statutory purpose, as it would deprive borrowers of information that could help them avoid foreclosure and penalize lenders who attempt to ensure their customers are better informed. It ****1236** could also result in windfalls to borrowers resulting from clerical errors and bona fide attempts by lenders to assist borrowers in avoiding foreclosure.

Accordingly, the order of the Appellate Division insofar as appealed from should be reversed, with costs, defendant Andrew Kessler's motion for summary judgment dismissing the complaint as against him denied, plaintiff's motion for summary judgment granted in accordance with this opinion, case remitted to Supreme Court for further proceedings, and certified question answered in the negative.

Acting Chief Judge Cannataro and Judges Rivera, Garcia, Singas and Troutman concur.

Order insofar as appealed from reversed, with costs, defendant Andrew Kessler's motion for summary judgment dismissing the complaint as against him denied, plaintiff's motion for summary judgment granted in accordance with the opinion herein, case remitted to Supreme Court, Westchester County, ***329** for further proceedings, and certified question answered in the negative.

All Citations

39 N.Y.3d 317, 206 N.E.3d 1228, 186 N.Y.S.3d 85, 2023 N.Y. Slip Op. 00804

Footnotes

1 That language was added by the legislature in 2009 as part of legislation whose principal change was to expand the borrower protections of the 2008 law from only subprime home loans to all home loans.

2 The mortgage was originally executed in favor of MLD Mortgage, Inc., and was later assigned to Bank of America.

3 Mr. Kessler challenges neither the inclusion of this sentence, although it does not comprise part of the required statutory language, nor the minor variations Bank of America made to the statutory language—an inconsistency his argument for a bright-line rule fails to address and an implicit acknowledgement that some changes will not void the notice.

4 Because Supreme Court does not appear to have resolved defendant's request for attorney's fees, we treat that order as nonfinal and therefore deem it necessary to answer the Appellate Division's certified question (*see* NY Const, art VI, § 3[b][4], [5]; CPLR 5602[b][1]).

5 For reasons unrelated to those before us now, *Engel* was recently legislatively overruled (*see* L 2022 ch 821 § 8–e).

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178 A.D.2d 138
Supreme Court, Appellate Division, First Department, New York.

Henry J. BICKEL, as Executor of the Estate of Rogneda Bickel, deceased, and Henry J. Bickel, Individually, Plaintiffs–Appellants,
v.
Marcia ABRAMSON, As Executrix of the Estate of Maxwell Abramson, the Presbyterian Hospital in the City of New York, Ted Y. Lai and Columbia–Presbyterian Radiologists, Defendants–Respondents.

Dec. 3, 1991.

Synopsis
The Supreme Court, New York County, Dontzin, J., granted hospital's motion to dismiss fraudulent concealment complaint as barred by statute of limitations. Patient's husband appealed. The Supreme Court, Appellate Division, held that two and one-half year medical malpractice statute of limitations applied to action for alleged fraudulent concealment of patient's condition which was indicative of incipience of lung cancer.

Affirmed.

**572 Before MILONAS, J.P., and ROSENBERGER, KUPFERMAN, ROSS and ASCH, JJ.

Opinion

MEMORANDUM DECISION.

*138 Order, Supreme Court, New York County (Michael J. Dontzin, J.), entered October **573 1, 1990, which granted defendants' motions to dismiss the complaint as barred by the Statute of Limitations, is unanimously affirmed, without costs.

The complaint alleges that in or around 1981, when plaintiff's decedent was admitted to the defendant-hospital for surgery to correct a problem with her hearing, chest X-rays were taken that revealed a "pulmonary density" in the right upper lung field indicative of incipience of the lung cancer that eventually caused her death in May 1986. Plaintiff further alleges that defendants misrepresented to him and his decedent that the chest X-rays were normal, inducing decedent to forgo additional testing and early treatment that might have cured her. However, as the complaint was not served on the various defendants until 1985, IAS dismissed the action as barred by the 2½–year Statute of Limitations set forth in CPLR 214–a. We agree. Without the allegation of underlying malpractice, no cause of action for fraudulent concealment, as outlined by the Court of Appeals in *Simcuski v. Saeli,* 44 N.Y.2d 442, 453–454, 406 N.Y.S.2d 259, 377 N.E.2d 713 is stated (*Rizk v. Cohen,* 73 N.Y.2d 98, 105–106, 538 N.Y.S.2d 229, 535 N.E.2d 282). Plaintiffs' purported cause of action for common law fraud alleges nothing more than defendants' mere nondisclosure of decedent's true condition, and, as such, is no different from the customary malpractice action (*Simcuski v. Saeli, supra,* 44 N.Y.2d at 452, 406 N.Y.S.2d 259, 377 N.E.2d 713; *Harkin v. Culleton,* 156 A.D.2d 19, 26, 554 N.Y.S.2d 478, *appeal dismissed,* 76 N.Y.2d 936, 563 N.Y.S.2d 64, 564 N.E.2d 674).

All Citations

178 A.D.2d 138, 576 N.Y.S.2d 572

81 N.Y.2d 681
Court of Appeals of New York.

In the Matter of BRANFORD HOUSE, INC., et al., Appellants,
v.
Felice MICHETTI, as Commissioner of Housing Preservation and Development of the City of New York, et al., Respondents.

Oct. 12, 1993.

Synopsis
Article 78 proceeding was brought to vacate determination that limited-profit housing company had to pay surplus prior to dissolving and "going private." The Supreme Court, New York County, Moskowitz, J., dismissed, and appeal was taken. The Supreme Court, Appellate Division, 187 A.D.2d 380, 590 N.Y.S.2d 198,affirmed, and further review was sought. The Court of Appeals, Hancock, J., held that: (1) company failed to establish that inclusion of term "state" in statutory exception from surplus requirement was inadvertent and that exception also applied to its city-aided project, and (2) company's long-term mortgage debt was not to be considered in calculating surplus to be repaid.

Affirmed.

Attorneys and Law Firms

***682 **11** Szold & Brandwen, P.C., New York City (Alan G. Blumberg, Eric J. Weisberg and Robert I. Goodman, of counsel), for appellants.

***683** O. Peter Sherwood, Corp. Counsel, New York City (Timothy J. O'Shaughnessy and Kristin M. Helmers, of counsel), for respondents.

*****291 *684 **12 OPINION OF THE COURT**

HANCOCK, Judge.

This proceeding involves a limited-profit (or Mitchell–Lama) housing company, which voluntarily dissolved by prepaying its subsidized mortgage in order to remove the housing project from City regulation and "go private". The parties dispute the application and interpretation of Private Housing Finance Law § 35. Section 35 provides that, except for projects aided by a State loan, upon dissolution, any surplus in the housing company's treasury, after accounting for various expenses, obligations and the housing company's profit, must be paid to the municipality that granted the housing company a tax exemption.

Petitioners raise two arguments. First, despite the limiting language in section 35(3) indicating that only projects aided by a *State* loan are exempt from the surplus requirement, they contend that their project, which was aided by a non-State loan, is exempt from the surplus requirement because the limiting word "state" was accidentally inserted into section 35 when it was

recodified in 1961. Second, petitioners argue that, even if they are not exempt from the surplus requirement, section 35 should be construed so as to permit them to deduct the prepayment of their mortgage debt in calculating their surplus, thereby eliminating any surplus they might have been required to repay. For the reasons that follow, we reject petitioners' contentions.

I.

In 1963, petitioner Branford House, Inc. (Branford), now dissolved, became a limited-profit housing company under article II of the Private Housing Finance Law. As such, it received a 50–year, low-interest loan from the New York City Board of Estimate and a 30–year exemption from local and municipal taxes for a 159–unit apartment building to be constructed in the Bronx to provide low-rental housing for middle income families. In exchange for the receipt of these financial advantages, Branford promised to remain a limited-profit housing company in the Mitchell–Lama program for a minimum of 20 years before filing for dissolution. In 1989, ***685** after being notified of Branford's intention to dissolve, respondent New York City Department of Housing Preservation and Development informed Branford that it was required to pay a surplus of $377,074 pursuant to section 35(3).[1] Branford prepaid its mortgage balance of $2,471,095.74 due to the City and conveyed the property to petitioner New Branford, Inc. Petitioners also paid the surplus to respondents under protest. They then commenced this proceeding.

Supreme Court concluded that petitioners owed the surplus. The Appellate Division unanimously affirmed, and rejected petitioners' claim that the word "state" had been inadvertently inserted into section 35(3). The Court also concluded that there was no merit to petitioners' position that the mortgage should be considered when calculating the surplus (187 A.D.2d 380, 382, 590 N.Y.S.2d 198). We granted petitioners leave to appeal and now affirm.

II.

We first address petitioners' contention that it is exempt from application of the surplus requirement because the word "state" was inadvertently inserted into Private Housing Finance Law § 35(3). That section exempts from the surplus requirement those housing companies that were "aided by a *state* loan made after" May 1, 1959 (emphasis added).[2] Branford's project *****292 **13** was aided by a loan, made after May 1, 1959, by the City, not the State. Thus, the City's loan to Branford does not fall within the express language of the statutory exemption from the surplus requirement. Petitioners argue, however, that the insertion of the limiting word "state" before the ***686** word "loan" in the 1961 recodification of the Limited–Profit Housing Companies Law was an inadvertent clerical error, and that section 35(3) should be applied as if the clerical error had not been made. If the statute is read without the limiting word "state", inasmuch as the project was aided by "a loan" made after May 1, 1959, it would be exempt from the surplus requirement.

Generally, a court may not assume the existence of legislative error and change the plain language of a statute to make it conform to an alleged intent. However, a court may apply a statute by disregarding a clerical error in legislation so as to make the corrected statute conform to the Legislature's true intent, if it is established unquestionably that (1) the true legislative intent is contrary to the statutory language, and (2) the mistake is due to inadvertence or clerical error (McKinney's Cons.Laws of N.Y., Book 1, Statutes § 362; *see, People ex rel. French v. Lyke,* 159 N.Y. 149, 152–153, 53 N.E. 802; *McKee Land & Improvement Co. v. Williams,* 63 App.Div. 553, 561, 71 N.Y.S. 1141, *affd.* 173 N.Y. 630, 66 N.E. 1112; *Matter of Deuel,* 116 App.Div. 512, 514–515, 101 N.Y.S. 1037; *People ex rel. Fitch v. Lord,* 9 App.Div. 458, 41 N.Y.S. 343).

We first hold that petitioners have failed to meet their burden of establishing without question that the Legislature in the 1961 recodification of section 35(3) did not intend to restrict the scope of the exemption from the surplus requirement to projects aided by a State loan. On the contrary, the legislative history of section 35(3) supports equally the conclusion that limiting the

surplus exemption to State-aided projects was a considered decision of the 1961 Legislature. Indeed, the Legislature in 1959 so limited the surplus exemption. Although in 1960 it expanded the exemption to projects aided by any loan, in 1961 it again limited the exemption to State-aided projects, just as it had done in 1959.[3] Petitioners do not offer any persuasive reason why the Legislature's 1961 amendment should be considered any less deliberate than the ones in 1959 and 1960. Petitioners argue that because the insertion ***687** of the word "state" in 1961 was a substantive change contrary to the 1961 legislative history's statements that the recodification was intended to be without substantive change, the 1961 amendment should not be given effect. But, such a general statement of legislative intent is not sufficient to meet petitioners' heavy burden of establishing that the Legislature's intended meaning was contrary to the plain language of a statute, especially where that language has been left unchanged by the Legislature for over 30 years.

We also conclude that petitioners have failed to establish that the insertion of the word "state" in the 1961 amendment was a clerical error. The claimed error is not the typical mistake in drafting—i.e., a typographical error, misspelling or a transposition ****14** of *****293** letters or numerals. Rather, the purported error is in the inclusion of a substantive word in the statute. Nothing has been shown about the circumstances surrounding the incorporation of this word that would suggest that it was due to a clerical error in drafting or printing (*cf., People ex rel. French v. Lyke,* 159 N.Y. 149, 152–153, 53 N.E. 802, *supra* [omission of the word "or"]; *McKee Land & Improvement Co. v. Williams,* 63 App.Div. 553, 71 N.Y.S. 1141, *affd.* 173 N.Y. 630, 66 N.E. 1112,*supra* [reference to chapter 744 rather than chapter 774]). The parties agree that no documentary evidence exists that accounts for the alleged mistake, and petitioners' attempt to explain it is wholly speculative. Furthermore, the inclusion of the word "state" in section 35(3) does not create any anomaly in the statute or result in a statutory scheme that is not entirely reasonable (*cf., Matter of Deuel,* 116 App.Div. 512, 514–515, 101 N.Y.S. 1037, *supra; People ex rel. Fitch v. Lord,* 9 App.Div. 458, 41 N.Y.S. 343, *supra*). On the contrary, without the inclusion of the limiting word "state", the exemption would apply to all loans made after May 1, 1959 regardless of source, and thus, in effect, eliminate the surplus requirement. A court should certainly not attribute such a far-reaching result to an alleged clerical error without stronger evidence than petitioners have provided.

III.

Given our conclusion that the surplus requirement of Private Housing Finance Law § 35(3) applied to Branford, we now address petitioners' alternative argument that Branford's mortgage debt should have been included as part of "indebtedness" under section 35(3) and, thus, should have been deducted in making the surplus calculation. The parties agree that if Branford's mortgage debt is so deducted, no surplus exists. Section 35(2), provides, in pertinent part, that a limited-profit housing company may voluntarily dissolve upon ***688** payment in full of its mortgage debt.[4] Section 35(3) further states that before such dissolution, "payment shall be made of all current operating expenses, taxes, indebtedness and all accrued interest thereon and the par value of and accrued dividends on the outstanding stock of such company." After making such payments, any surplus remaining in the treasury of the housing company shall be paid to the municipality which granted the company a tax exemption.

Petitioners' claim that its mortgage debt should have been deducted in making the surplus calculation is not persuasive. Read sequentially so as to give section 35 "a sensible and practical over-all construction" (*Matter of Long v. Adirondack Park Agency,* 76 N.Y.2d 416, 420, 559 N.Y.S.2d 941, 559 N.E.2d 635), subdivision (2) first requires, for a housing company to be eligible for voluntary dissolution, that the mortgage be paid, and subdivision (3) thereafter provides that the surplus be calculated based upon, in part, the payment of any current indebtedness. Petitioners' contention that the mortgage debt referred to in subdivision (2) is merely one component of the indebtedness referred to in subdivision (3) fails to recognize the different purposes of the two subdivisions. Subdivision (2) establishes the basic criteria which must be met for a housing company to qualify for voluntary dissolution. Subdivision (3) addresses the distinct requirement of calculating any surplus to be paid to the municipality after dissolution and conveyance of the project. If the unpaid mortgage of subdivision (2) constituted "indebtedness" under subdivision (3), as petitioners assert, the requirement of subdivision (3) that all indebtedness be paid before dissolution would render subdivision (2) superfluous to the extent that it requires the unpaid mortgage to be paid before dissolution. A construction ****15** rendering statutory language superfluous is to *****294** be avoided (*see, Sanders v. Winship,* 57 N.Y.2d 391, 396, 456 N.Y.S.2d 720, 442 N.E.2d 1231; McKinney's Cons.Laws of

N.Y., Book 1, Statutes § 98).

Moreover, petitioners' interpretation of section 35 would subvert the carefully balanced bargain between the investors and the governmental entities created by the statutory scheme of the Private Housing Finance Law: i.e., the investors agree to a 6% per year limit on the profit they may earn and to be subject to rent regulation while operating as a limited-profit housing company in return for receiving long-term, low-interest government loans and real estate tax exemptions. Typically after 20 years of providing low-rental housing, the company may "go private" pursuant to section 35 by paying off its mortgage debt and dissolving as a limited-profit ***689** housing company. It then may "cash in" its equity in the property by selling, leasing or renting it and thereby realize whatever profit the market will provide (*see, Matter of Columbus Park Corp. v. Department of Hous. Preservation & Dev.,* 80 N.Y.2d 19, 23–24, 586 N.Y.S.2d 554, 598 N.E.2d 702).

In accordance with the statutory scheme, section 35(2) offsets a housing company's long-term mortgage debt against its equity in the property and section 35(3) separately offsets the housing company's operating expenses, including "indebtedness", against its rental income, with any surplus beyond the 6% profit limit to go to the municipality that granted the tax exemption.[5] By claiming that the mortgage debt referred to in section 35(2) is part of the surplus calculation in section 35(3), petitioners are, in effect, seeking to use any surplus achieved as a limited-profit housing company to pay off the mortgage debt, thereby increasing the investors' equity in the property. Because surplus represents operating profits beyond the 6% limit, if investors were allowed to retain the surplus in the form of increased equity, they would be exceeding the 6% limit on profits. This would be contrary to the statute's purpose (*see, Matter of Long v. Adirondack Park Agency,* 76 N.Y.2d 416, 420, 559 N.Y.S.2d 941, 559 N.E.2d 635 *supra*).

In sum, in view of the language, structure and purpose of section 35 of the Private Housing Finance Law, we conclude that a limited-profit housing company's long-term mortgage debt is not to be considered in calculating the surplus to be repaid under section 35(3).

The order of the Appellate Division should be affirmed, with costs.

KAYE, C.J., and SIMONS, TITONE, BELLACOSA and LEVINE, JJ., concur.

SMITH, J., taking no part.

Order affirmed, with costs.

All Citations

81 N.Y.2d 681, 623 N.E.2d 11, 603 N.Y.S.2d 290

Footnotes

1 The City later recomputed the amount as $337,191, and later it was reduced to $298,107.

2 Section 35(3) states: "Upon such dissolution, title to the project may be conveyed in fee to the owner or owners of its capital stock or to any corporation designated by it or them for the purpose, or the company may be reconstituted pursuant to appropriate laws relating to the formation and conduct of corporations, provided, however, that *prior to any such dissolution and conveyance or reconstitution, payment shall be made of all current operating expenses, taxes, indebtedness and all accrued interest thereon and the par value of and accrued dividends on the outstanding stock of such company.* If after making such payments, and after conveyance of the project, a surplus remains in the treasury of the company, *such surplus, except in the case of a project aided by a state loan made after May first, nineteen hundred fifty-nine, shall upon dissolution, be paid into the general fund of the municipality* which granted tax exemption. After such dissolution and conveyance, or such reconstitution, the provisions of this article shall become and be inapplicable to any such project and its owner or owners and any tax exemption granted with respect to

such project pursuant to section thirty-three hereof shall cease and terminate" (emphasis added).

[3] Section 35's predecessor originally did not exempt any projects from the surplus requirement (L.1956, ch. 877, § 22). In 1959 the Legislature created an exemption to the surplus requirement and that exemption was limited to projects aided by a State loan (L.1959, ch. 675, § 3). Then in 1960 the Legislature expanded the exemption from the surplus requirement to projects aided by "a loan" (L.1960, ch. 669, § 4). In 1961, the Legislature recodified the subject statute as Private Housing Finance Law § 35, providing that the exemption from the surplus requirement applied only to "a project aided by a state loan made after" May 1, 1959 (L.1961, ch. 803).

[4] Section 35(2) provides: "A company aided by a loan made after May first, nineteen hundred fifty-nine, may voluntarily be dissolved, without the consent of the commissioner or of the supervising agency, as the case may be, not less than twenty years after the occupancy date upon the payment in full of the remaining balance of principal and interest due and unpaid upon the mortgage or mortgages and of any and all expenses incurred in effecting such voluntary dissolution."

[5] Section 35(3), by providing that the par value of, and all accumulated dividends on, the company's stock be paid before any remaining surplus is paid to the municipality, tries to insure that the investors receive both their original investment and 6% per year profit upon dissolution. In other words, the housing company's operating profit goes to insuring that the investors receive their original investment, plus 6% per year on that investment, before it goes to the municipality as surplus (*see,* Private Housing Finance Law § 24[1]; § 27[2]; § 28[1]).

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78 A.D.2d 1004
Supreme Court, Appellate Division, Fourth Department, New York.

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., Appellant,
v.
The COUNTY OF ONEIDA et al., Respondents.

Nov. 13, 1980.

Synopsis
Breach of contract action was brought arising out of dispute over meaning of provision contained in collective bargaining agreement covering county employees. Appeal was taken from judgment of the Oneida Supreme Court, Inglehart, J. The Supreme Court, Appellate Division, held that: (1) since contract was a public employment contract which could only become binding through enactment of appropriate legislation the ambiguity could be resolved only by reference to legislation adopting and implementing the contract, and (2) testimony of legislators sitting at time the contract was adopted was properly excluded.

Affirmed.

Attorneys and Law Firms

****908** Roemer & Featherstonhaugh, William F. Reynolds, Albany by Michael Smith, Albany, of counsel, for appellant.

Donald E. Keinz, Utica by Thomas Bogan, Utica, for respondents.

Before CARDAMONE, J. P., and SIMONS, HANCOCK, CALLAHAN and MOULE, JJ.

Opinion

MEMORANDUM:

This action arises out of a dispute over the meaning of one of the provisions contained in the collective bargaining agreement between the County of Oneida (County) and the Civil Service Employees Association (CSEA) on behalf of the County employees which was in effect from January 1, 1974 through December 31, 1975. The basic issue presented for determination by the court at a nonjury trial was the interpretation of language in the agreement as to the basic economic rate (BER) and whether or not it applies to new employees. The parties were agreed that the contract contemplated the abolition of salary steps or increments one step at a time each year for five years behind employees. They disagreed only as to whether new employees hired in 1974 and 1975 were to receive the benefit of this provision. CSEA argues that they were included by the use of the term "present employees". The record discloses that CSEA sought to establish legislative intent through the testimony of individual legislators, a tactic ultimately disapproved by the court. Upon completion of the trial, the court found that plaintiff failed to meet its burden of proof and declined to interpret the ambiguous term stating, "The contract cannot be redrawn by the court. The matter should be finally resolved by the board of legislators." On appeal, CSEA contends that the trial judge committed prejudicial error by excluding relevant evidence offered by the plaintiff.

The trial court was requested to determine and effectuate the legislative purpose behind resolution No. 22 of 1974. Testimony of intent by the parties or representatives of the parties who had a voice in the decision would be competent and highly relevant if this were an action based solely on contract. Since this is a public employment contract which can only become binding on the County through enactment of appropriate legislation, the ambiguity can be resolved only by reference

to the legislation adopting and implementing the contract. The requirement of legislative approval converts this contract question into an issue of statutory construction.

The intention of the legislature is first to be sought from the act itself, and the statute is to be construed according to its most natural and obvious sense (Patrolmen's Benevolent Assn. of City of N. Y. v. City of New York, 41 N.Y.2d 205, 208, 391 N.Y.S.2d 544, 359 N.E.2d 1338; Matter of Niagara Falls Urban Renewal Agency v. O'Hara, 57 A.D.2d 471, 473, 394 N.Y.S.2d 951; City of Syracuse v. Hueber, 52 A.D.2d 341, 344, 383 N.Y.S.2d 774; McKinney's Cons.Laws of N.Y., Book 1, Statutes s 92). Where the statutory language is ambiguous the courts must look to the legislative history and circumstances surrounding enactment in order to determine legislative purpose (****909** Rankin v. Shanker, 23 N.Y.2d 111, 295 N.Y.S.2d 625, 242 N.E.2d 802; New York State Bankers Assn. v. Albright, 38 N.Y.2d 430, 381 N.Y.S.2d 17, 343 N.E.2d 735). The court herein had the benefit of the January 16, 1974 hearing on the contract and the ***1005** factfinder's report. However, CSEA sought to supplement the legislative history with the testimony of legislators sitting at the time the contract was adopted. The court properly excluded this proof.

Pre-enactment statements, particularly those of a bill's sponsor, are properly considered as part of the legislative history (Matter of Fisher v. New York State Employees' Retirement System, 279 App.Div. 315, 110 N.Y.S.2d 16; Young v. Town of Huntington, 88 Misc.2d 632, 388 N.Y.S.2d 978). However, post-enactment statements or testimony by an individual legislator, even a sponsor, is irrelevant and was properly excluded. This post-enactment rule does not apply, however, when such testimony might be appropriate in extraordinary circumstances, such as when the constitutionality of a particular measure is challenged and the existence of a discriminatory purpose, or motivation, becomes relevant (see Village of Arlington Heights v. Metropolitan Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450). Our review of the record discloses that no extraordinary circumstances exist in this case. The testimony of County legislators as to the legislative purpose in enacting Resolution No. 22 was properly excluded and the judgment of the court is supported by the weight of the evidence.

Judgment unanimously affirmed without costs.

All Citations

78 A.D.2d 1004, 433 N.Y.S.2d 907

5 A.D.2d 140
Supreme Court, Appellate Division, Second Department, New York.

CLUETT, PEABODY & CO., Inc., Appellant-Respondent,
v.
J. W. MAYS, Inc., Respondent-Appellant.

Jan. 6, 1958.

Synopsis

Action by shirt manufacturer to enjoin department store from selling or advertising certain of manufacturer's shirts at less than prices stipulated in a fair trade contract. The Supreme Court, Special Term, Meier Steinbrink, Special Referee, 6 Misc.2d 145, 165 N.Y.S.2d 992, entered conditional judgment for manufacturer, and both parties appealed. The Supreme Court, Appellate Division, Nolan, P. J., held that where department store had no knowledge when it purchased certain shirts, that by virtue of a contract manufacturer had entered into with a retailer, such shirts were subject to fair trade prices, advertising and sale of the shirts by department store at price below fair trade price did not amount to unfair competition within meaning of fair trade statute, and such purchase without knowledge constituted a complete defense to manufacturer's action to enjoin such advertising and sale.

Judgment reversed and complaint dismissed.

Murphy, J., dissented.

Attorneys and Law Firms

****256 *142** James A. Thomas, Jr., New York City and Stephen Rackow Kaye, New York City, for appellant-respondent.

****257** Milton Kunen, Sidney A. Diamond and Donald H. Balleisen, New York City, for respondent-appellant.

Opinion

NOLAN, Presiding Judge.

We are required on this appeal to determine whether or not the provisions of article XXIV–A of the General Business Law (Fair Trade Law) were properly invoked against respondent-appellant (hereinafter referred to as defendant) under the circumstances disclosed by the record before us and, if so, whether it was proper to grant a conditional injunction against defendant, restraining it from selling articles of merchandise at less than their fair-trade prices.

Cluett, Peabody & Co., Inc., (hereinafter referred to as plaintiff) sued defendant to enjoin discount sales and advertising in violation of a fair-trade contract covering men's shirts manufactured by plaintiff, and bearing its registered trade-mark. After trial, an injunction was granted enjoining defendant from selling such merchandise below the prices fixed therefor in plaintiff's fair-trade contract 'except that as to the said shirts * * * defendant may offer to sell to plaintiff the balance of the stock now on hand at the cost to it * * * and in the event of the failure of plaintiff, within ten days from date hereof, to purchase said balance on hand, then defendant may dispose thereof at any price obtainable, without reference to the fair trade agreement.' Plaintiff appeals from the quoted portion of the judgment; defendant appeals from the entire judgment. Defendant has also moved to dismiss plaintiff's appeal on the ground that it is academic.

There is little dispute as to the facts, with one exception, and they are succinctly stated in the Referee's decision. On January 28, 1955 plaintiff entered into a fair-trade agreement with a New York City department store retailer (other than defendant) providing for minimum prices for the sale in New York State at retail of some but not all of its varieties of men's shirts. Notice of the establishment of a fair-trade price-maintenance agreement was given by plaintiff to its many New York State customers and a general press release dated July 27, 1956 seems to have resulted in three short news items published about August 1, 1956 to the effect that plaintiff, starting August 1, would fair trade certain of its varieties of shirts.

Defendant owns and operates three large cash-and-carry department stores. On March 13, 1957 it purchased from an exporter, Colamerica Company, approximately 200 dozen men's shirts manufactured by plaintiff of which approximately 147 ***143** dozen were of the varieties covered by plaintiff's fair-trade agreement. The shirts were delivered to defendant on March 15. They were put on sale and prominently featured in defendant's advertisements on April 5 and 12, at prices considerably less than the minimum prices stipulated in plaintiff's agreement. When the matter was brought to plaintiff's attention, it promptly notified defendant ****258** by registered mail that certain of its shirts were subject to a fair-trade contract with minimum resale prices specified. Defendant continued to advertise and sell the shirts, including those price-fixed, at prices below the specified minimums, and this action followed.

The disputed issue of fact, above referred to, was whether or not, at the *time of its purchase* of the shirts, defendant knew that they were subject to a fair-trade agreement. Defendant asserted that it had no such knowledge, its president, Shulman, and its men's wear buyer, Baruchin, who negotiated the purchase, testifying to that effect. Plaintiff offered no proof of direct knowledge on the part of defendant, but claims that defendant must have known of the fair-trade agreement. That contention may be disposed of summarily. The trial court found to the contrary and that finding is supported by the evidence. For the purposes of this appeal, it must be held that defendant had no knowledge, actual or constructive, of the fair-trade agreement at the time it purchased the shirts in question in March, 1957. Concededly, it had such knowledge when it sold them.

It is plaintiff's contention that it met every requirement of the statute for full and effective injunctive relief, and that the conditions and limitations imposed by the Referee, respecting the return of the merchandise or its sale below the fair-trade price, were erroneous and effected a complete frustration of the statutory purpose. Defendant contends that no injunctive relief whatever was warranted, and that in any event plaintiff's appeal should be dismissed as academic since the goods which are the subject of plaintiff's appeal have been disposed of.

Defendant states without contradiction that the shirts were tendered to plaintiff as required by the judgment, that the tender was refused, and that the shirts were then sold at reduced prices to expedite their removal from stock. At present, defendant has none of such shirts in stock and sells none.

It is of course the general rule that the court will not decide questions which have become abstract because of a change in circumstances affecting the case after the decision below. Adirondack League Club v. Board of Black River Regulating Dist., 301 N.Y. 219, 222, 93 N.E.2d 647, 648. However, an exception is made where ***144** questions of importance are presented, which are likely to arise with frequency. Lyon Co. v. Morris, 261 N.Y. 497, 499, 185 N.E. 711; Glenram Wine & Liquor Corp. v. O'Connell, 295 N.Y. 336, 340, 67 N.E.2d 570, 571; Rosenbluth v. Finkelstein, 300 N.Y. 402, 404, 91 N.E.2d 581. In our opinion, this is such a case. The primary question presented is whether or not the Fair Trade Law may be successfully invoked against one who has established that he purchased merchandise in ignorance of the fact that it was subject to resale price restrictions under a fair-trade agreement to which he was not a party. Plaintiff urges that lack of knowledge ****259** at the time of purchase is immaterial if there was such knowledge at the time of offering for sale, while defendant contends that lack of knowledge at the time of purchase is a complete defense. There is also presented, if the Fair Trade Law may be enforced against such a purchaser, the question whether the goods may be sold at any price if the manufacturer who seeks to enforce his statutory rights refuses to buy them back. Neither question appears to have been decided by any appellate court in this State, although the former was presented in Oneida v. Macher Watch Co., 254 App.Div. 859, 6 N.Y.S.2d 362. Under the circumstances, we believe that we should deny defendant's motion to dismiss the appeal (see Cluett, Peabody & Co. v. J. W. Mays, Inc., 5 A.D.2d 770, 170 N.Y.S.2d 491) and should pass upon the merits.

The determination of the appeals by both parties depends upon whether plaintiff established a cause of action under section 369–b of the General Business Law, which provides:

'Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person

damaged thereby.'

If such a right of action was established there is no authority for the learned Referee's ruling that defendant could sell the shirts in question at any price, if plaintiff refused their return. As plaintiff argues, and defendant apparently concedes, the 'closing-out' exception contained in the statute (General Business Law, § 369–a, subd. 2[a]), is inapplicable (cf. Remington Arms v. Harris Berger, Inc., 208 Misc. 561, 144 N.Y.S.2d 751), although defendant asserts that the determination was proper, to achieve substantial justice between the parties. We do not agree that justice requires such a result. If in fact the law is violated by the sale of fair-trade merchandise, with knowledge at the time of sale that it is so price-fixed, regardless ***145** of whether there was such knowledge at the time of acquisition, the decision under review frustrates the statutory purpose. It would permit any retailer, under similar circumstances, to sell below the minimum fair-trade price, if the manufacturer refused to repurchase the goods at the retailer's cost. In effect, the manufacturer could only maintain its prices by repurchasing from a retailer the goods which were to be sold in violation of the fair-trade contract. The statute contemplates no such obligation on the part of the manufacturer, and in our opinion there is no warrant for imposing such a duty upon it. Cf. Bridgeport Brass Co. v. Modell's Sporting Goods Co., 8 Misc.2d 714, 92 N.Y.S.2d 96.

If knowledge at the time of sale, as distinguished from knowledge at the time of acquisition, is sufficient to show that there was a knowing and ****260** willful violation of the statute, plaintiff should be entitled to full and unconditional relief. We are therefore of the opinion that the determinative question in the case is whether a violation of the statute is shown where the defendant acquired merchandise without knowledge that it was subject to a fair-trade agreement, although such knowledge was present at the time the goods were offered for sale. In our opinion that question should be answered in the negative.

It has been stated that 'Plaintiff's cause of action depends upon defendant's knowledge of the existence of the resale price maintenance system and of the price stipulated by the trade-mark owner. By the almost unanimous interpretation of the Fair Trade Acts in state and federal courts, the defendant must have had this knowledge *at the time he acquired the goods*' (1 Callmann on Unfair Competition and Trade-Marks [2d ed.], p. 489). (Emphasis supplied.) And it has been held, with respect to identical provisions of our original Fair Trade Law (L.1935, ch. 976), that 'The entire theory of the statute is that it applies only to merchandise acquired after knowledge. Were it otherwise, the statute would permit price fixing by fiat, and it is due to the fact that this is not the tenor of the statute that it is constitutional.' Seagram-Distillers Corp. v. Seyopp Corp., 8 Misc.2d 778, 2 N.Y.S.2d 550, 552. Similar views have been expressed by our own courts, and those of other jurisdictions. (See, Oneida v. Macher Watch Co., N.Y.L.J., April 8, 1938, p. 1706, col. 3, affirmed 254 App.Div. 859, 6 N.Y.S.2d 373, supra; Frankfort Distilleries v. Stockman, N.Y.L.J., March 29, 1941, p. 1411, col. 5; Shryock v. Association of United Fraternal Buyers, 135 Pa.Super. 428, 5 A.2d 581; Lionel Corp. v. Grayson-Robinson Stores, 15 N.J. 191, 104 A.2d 304; James Heddon's Sons v. Callendar, D.C., 29 F.Supp. 579. A contrary view has been expressed in Wisconsin (see ***146** Calvert Distillers Corp. v. Goldman, 255 Wis. 69, 37 N.W.2d 859). We are in accord with the views expressed in our own State in the case heretofore cited.

Section 369–a of the General Business Law declares that a contract shall be legal, which provides that a buyer of a commodity bearing the label, trade-mark, brand or name of the owner or producer, may not resell it except at the price stipulated by the vendor. To this extent section 369–a has made no change in the common law, as declared in this State in respect of commodities in intrastate commerce. No statute was required to effect that result. Port Chester Wine & Liquor Shop v. Miller Bros. Fruiterers, 253 App.Div. 188, 1 N.Y.S.2d 802; Marsich v. Eastman Kodak Co., 244 App.Div. 295, 279 N.Y.S. 140, affirmed 269 N.Y. 621, 200 N.E. 27; Bourjois Sales Corp. v. Dorfman, 273 N.Y. 167, 170–171, 7 N.E.2d 30, 31, 110 A.L.R. 1411. Section 369–b, however, goes much further. It creates a new cause of action by which the restrictive provisions of such contracts may be enforced against those who are not parties to the fair-trade agreements. We believe that the ****261** provisions of this section should be strictly construed, but, of course, they must receive a construction consistent with their purpose to protect the good will of the owner or producer from injury when his trade-mark or name is employed in the sale of goods. There are, however, limits beyond which the Legislature may not go to effect that purpose. However important the object of the statute may appear to be, it is subject nevertheless to constitutional requirements.

Section 369–b does not prohibit the mere advertising, offering for sale or selling of a commodity at less than the price stipulated in a fair-trade agreement. It is the doing of these things knowingly and willfully which is declared to be unfair competition. We do not believe that this language is so clear that it allows no room for construction, or that it may receive the liberal interpretation contended for by plaintiff. It is not necessary for the purposes of this appeal to discuss the standard which has often been employed in testing the constitutional validity of price-fixing legislation, i. e., that in the absence of an emergency such validity is dependent on whether or not the particular business involved is 'affected with a public interest' (cf. Olsen v. State of Nebraska ex rel. Western Ref. & Bond Ass'n, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305; Darweger v.

Staats, 267 N.Y. 290, 308, 196 N.E. 61, 67; Double-day, Doran & Co. v. R. H. Macy & Co., 269 N.Y. 272, 281, 199 N.E. 409, 410, 103 A.L.R. 1325). We accept, for our purposes, the rule stated in Nebbia v. People of State of New York, 291 U.S. 502, 537, 54 S.Ct. 505, 78 L.Ed. 940, that, so far as due process is concerned and in the absence of other constitutional restriction, the Legislature is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted ***147** to its purpose. It may be conceded also that the protection of the good will of the producer of identified goods, created or enlarged by trade-marks, labels or brands, from injury through unfair competition is a legitimate legislative purpose and that price restriction, adopted as an appropriate means to that end and not as an end in itself, is constitutionally permissible. Cf. Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109. We are not concerned with the wisdom of the policy, or the adequacy or appropriateness of the law enacted to forward it (Nebbia v. People of State of New York, supra; Olsen v. State of Nebraska, supra). The legislative power is, nevertheless, not unlimited. Due process is satisfied only if the law passed has a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory (Nebbia v. People of State of New York, supra; Definance Milk Products Co. v. Du Mond, 309 N.Y. 537, 541, 132 N.E.2d 829, 830). Although legislative price-fixing powers are constitutionally limited, there is in this State no such limitation upon the fixing of resale prices, under legislative leave, by contract between the parties. It does not follow, however, that price restrictions contained ****262** in such a contract may be enforced by legislative fiat against one who not only never gave his assent thereto, but who purchased identified goods in complete ignorance of such restrictions. The question presented here is quite different from that which was decided by the United States Supreme Court in Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. at pages 193–194, 57 S.Ct. at pages 144, 145, supra, in which the constitutionality of an Illinois Fair Trade Act, Ill.Rev.Stat.1957, c. 121 ½, § 188 et seq., similar to our own statute was sustained, and in which it was said:
'It is first to be observed that section 2 reaches not the *mere* advertising, offering for sale or selling at less than the stipulated price, but the doing of any of these things *willfully* and *knowingly*. We are not called upon to determine the case of one who has made his purchase in ignorance of the contractual restriction upon the selling price, but of a purchaser who has had definite information respecting such contractual restriction and who, with such knowledge, nevertheless proceeds willfully to resell in disregard of it.

'Appellants here acquired the commodity in question with full knowledge of the then existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent ***148** liability under section 2 of the law by which such acquisition was conditioned. * * * 'Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it.' (Emphasis in original.)

No principle of fair dealing requires a similar determination in the instant case. As against a retailer who has accepted goods with a notice of minimum resale prices and with actual or presumptive knowledge of the law which authorized the restriction, it may well be argued that he has entered into at least an implied contract to maintain the prices stipulated, or in any event, that he is no position to complain that a price-fixing statute is unreasonable or arbitrary insofar as it enforces against him only those restrictions on resales to which he has voluntarily subjected himself. When it is sought however to enforce such contractual restrictions against those who are not parties to the contract and who have not assented to the scheme or subjected themselves thereto by acquisition of commodities with notice of restriction on their resale, the situation is entirely different, and the reasons which justify legislative ****263** compulsion against those who acquire identified commodities with notice have no application. The letter case does not involve the enforcement against a purchaser of property of a definite obligation assumed as a condition of his purchase. Moreover, the restrictions sought to be enforced without his assent would be formulated, not by the Legislature, but by private persons, not bound by any official duty and uncontrolled by any standard or rule prescribed by legislative action. The constitutional validity of a law is to be tested, not by what has been done under it, but by what may, by its authority, be done (Stuart v. Palmer, 74 N.Y. 183, 188; People ex rel. Beck v. Graves, 280 N.Y. 405, 410, 21 N.E.2d 371, 372). It seems obvious that price restrictions imposed under authority so delegated may be so arbitrary as to have no reasonable relation to the legislative purpose, and that their enforcement by law would be repugnant to the due process clauses of the Federal Constitution (U.S.Const., 14th Amdt., § 1) and those of our own Constitution (N.Y.Const., art. I, § 6) which guarantee due process and which vest the legislative power of the State in the Senate and the Assembly (N.Y.Const., art. III, § 1; Darweger v. Stats, 267 N.Y. 290, 196 N.E. 61, supra; cf. Concordia Collegiate Inst. v. Miller, 301 N.Y. 189, 93 N.E.2d 632, 21 A.L.R.2d 544; Eubank v. City of Richmond, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156; Carter v.

Carter Coal Co., 298 U.S. 238, 311, 56 S.Ct. 855, 80 L.Ed. 1160).

***149** We do not read this statute as attempting to go that far. We do not ascribe to the Legislature an intention to delegate its functions, to deny due process, or to impose an unreasonable or unjust burden on those who purchase identified commodities in good faith, without notice of resale restrictions, and who might have exercised a choice not to buy, if placed on notice thereof.

It is always presumed in regard to a statute that no unjust or unreasonable result was intended by the Legislature and, if a particular application of a statute in accordance with its literal sense will produce or occasion injustice, another and more reasonable interpretation should be sought (Matter of Meyer, 209 N.Y. 386, 103 N.E. 713, L.R.A.1915C, 615; United Parcel Service of New York v. Joseph, 272 App.Div. 194, 70 N.Y.S.2d 22). Consequences cannot alter statutes, but may help to fix their meaning (Matter of Rouss, 221 N.Y. 81, 91, 116 N.E. 782, 785). Moreover, it is our duty to construe the statute, if possible, not only so as to avoid the conclusion that it is unconstitutional, but also so as to avoid grave doubts on that score (People v. Barber, 289 N.Y. 378, 385, 46 N.E.2d 329, 331; Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 267, 115 N.E. 915, 917).

We conclude, under the circumstances here disclosed, that the advertising and sale of the shirts in question, without knowledge of the resale restrictions contained in plaintiff's fair-trade agreement, did not ****264** amount to unfair competition within the meaning of the statute, and that defendant established a complete defense to the cause of action asserted in the complaint.

We do not consider Bourjois Sales Corp. v. Dorfman, 273 N.Y. 167, 7 N.E.2d 30, 110 A.L.R. 1411, supra, authority to the contrary. The appeal in that case involved the sufficiency of a complaint, which was stated to be 'in no way different' from that before the Supreme Court in Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 57 S.Ct. 139, supra. A similar question was presented in National Distillers Products Corp. v. Seyopp Corp., 253 App.Div. 793, 1 N.Y.S.2d 1017, and on reargument in Seagram-Distillers Corp. v. Seyopp, Corp., 8 Misc.2d 778, 2 N.Y.S.2d 550, supra. We find no conflict between the holding in the latter cases that complaints were sufficient, although they did not allege knowledge of fair-trade restrictions at the time of purchase of identified commodities, and our determination that lack of such knowledge may be established as a defense. Neither have we overlooked the conclusion reached in Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra, that a provision of the Illinois Fair Trade Act similar to section 369–b of our own statute did not involve, as against the appellants in that case, an unlawful delegation of legislative power. That conclusion was based on the premise heretofore stated that the ***150** appellants had acquired identified commodities with knowledge of the restrictions imposed by fair-trade agreements, and that such restrictions already imposed with their knowledge ran with the acquisition and conditioned it. Moreover, it did not purport to decide any question of statutory validity under a State constitution.

The judgment should be reversed on the law, with costs, and the complaint should be dismissed, with costs. The findings of fact should be affirmed.

Judgment reversed on the law, with costs, and complaint dismissed, with costs. The findings of fact are affirmed.

WENZEL and BELDOCK, JJ., concur with NOLAN, P. J.

MURPHY, J., dissents and votes to modify the judgment by striking from the decretal paragraph thereof everything beginning with the word 'except' and ending with the word 'agreement', and to affirm the judgment as so modified, in opinion.

KLEINFELD, J., not voting.

MURPHY, Justice (dissenting).

All that is required under section 369–b of the General Business Law to justify an injunction is that defendant did willfully and knowingly (1) advertise, (2) offer for sale, or (3) sell, any commodity at less than the price stipulated in any contract entered into pursuant to section 369–a. ****265** It is undisputed that defendant knew that the commodity was price-fixed at the time that defendant sold it. Defendant is, therefore, subject to restraint under the second and third clauses of the statute. There is nothing in the statute which justifies withholding the remedy because the defendant did not know that the commodity had been fair-traded as of the time the defendant acquired it.

In Seagram-Distillers Corp. v. Seyopp Corp., 8 Misc.2d 778, 2 N.Y.S.2d 550, Mr. Justice Steuer in 1938 at the New York County Special Term cited Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 57 S.Ct. 139, as authority that a 'Plaintiff acquires rights only where merchandise is sold which has been acquired after notice.' That question was expressly left open in the Old Dearborn case (supra, 299 U.S. at page 193, 57 S.Ct. at page 144). Subsequently, Mr. Justice Steuer granted reargument and on reargument *granted* a temporary injunction. On the basis of the dubious authority of the Seagram-Distillers case, supra, it has been held that an injunction was warranted only where the purchaser had knowledge at the time of acquisition (James Heddon's Sons v. Callender, D.C., 29 F.Supp. 579; Frankfort Distilleries v. Stockman, N.Y.L.J., March 29, 1941, p. 1411, col. 5, Hooley, J., at the Kings County Special Term). It was also invoked in Oneida v. Macher Watch Co., N.Y.L.J., April 8, 1938, p. 1706, col. 3, affirmed 254 App.Div. 859, 6 N.Y.S.2d 373, but that affirmance may have been predicated on the ground that denial of a temporary injunction was discretionary. The same result was approved in a casual dictum in Lionel Corp. v. Grayson-Robinson Stores, 15 N.J. 191, 104 A.2d 304.

The foregoing is all of the authority in support of the theory that an injunction will not lie where the merchandise was acquired without knowledge. ***151** Shryock v. Association of United Fraternal Buyers, 135 Pa.Super. 428, 5 A.2d 581, cited by the majority, is inapplicable because there an injunction was denied where the defendant had no knowledge of the contract as of the time it sold the commodity.

To the contrary, it was pointed out in Calvert Distillers Corp. v. Goldman, 255 Wis. 69, 37 N.W.2d 859, and in Barron Motor v. May's Drug Stores, 227 Iowa 1344, 1346, 291 N.W. 152, that there was no provision in the pertinent fair trade act which rendered it inapplicable because the purchase had not made prior to receiving notice.

The soundness of the legislative omission to make knowledge at the time of acquisition a prerequisite for issuance of an injunction is illustrated by the facts under consideration. Plaintiff had entered into the fair-trade contract on January 28, 1955, had sent notices to each of its 400 customers in the metropolitan area and a press release to 17 newspapers and magazines in that area, as well as a notice to the trade generally. If, despite such notice, a defendant, as here, can successfully claim lack of knowledge that the commodity was price-fixed, then the efficacy of the statute is seriously curtailed.

****266** The courts cannot read into a plainly worded statute a provision which would be helpful in establishing constitutionality. That would be judicial legislation (Meltzer v. Koenigsberg, 302 N.Y. 523, 99 N.E.2d 679; People ex rel. Doctors Hosp. v. Sexton, 267 App.Div. 736, 740, 48 N.Y.S.2d 201, 204, affirmed 295 N.Y. 553, 64 N.E.2d 273).

The judgment should be modified by striking from the decretal paragraph thereof everything beginning with the word 'except' and ending with the word 'agreement', and as so modified the judgment should be affirmed.

All Citations

5 A.D.2d 140, 170 N.Y.S.2d 255

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13 A.D.3d 278
Supreme Court, Appellate Division, First Department, New York.

GULF INSURANCE COMPANY, Plaintiff–Appellant,
v.
TRANSATLANTIC REINSURANCE COMPANY, et al., Defendants–Respondents,
Employers Reinsurance Company, Defendant.

4762
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Dec. 28, 2004.

Synopsis

Background: Insurer sued reinsurers after they refused to pay their share of insurer's settlement with its insured under vehicle residual value protection policy, and reinsurers brought separate action against insurer, seeking rescission of reinsurance agreements and alleging that settlement between insurer and insured was unreasonable, in bad faith, and ex gratia. After actions were consolidated, the Supreme Court, New York County, Richard B. Lowe III, J., granted reinsurers' motion to compel discovery of privileged documents. Insurer appealed.

The Supreme Court, Appellate Division, held that access-to-records clauses in reinsurance agreements did not operate as blanket waiver of insurer's attorney-client or work product privileges.

Reversed.

Attorneys and Law Firms

****44** Simpson Thacher & Bartlett LLP, New York (Mary Kay Vyskocil of counsel), for appellant.

Sidley Austin Brown & Wood LLP, New York (Ronie M. Schmelz, of the California Bar, admitted pro hac vice, of counsel), for Transatlantic Reinsurance Company and Odyssey America Reinsurance Corporation, respondents.

Cadwalader, Wickersham & Taft LLP, New York (Ivan J. Dominguez of counsel), ****45** for XL Reinsurance America, Inc., respondent.

BUCKLEY, P.J., WILLIAMS, LERNER, GONZALEZ, SWEENY, JJ.

Opinion

***278** Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered May 26, 2004, insofar as it granted defendants-respondents' motion to compel plaintiff to produce privileged documents, unanimously reversed, on the law, with costs, and the motion to compel denied.

This appeal involves the question of whether a standard access to records clause in a contract waives any claim of privilege with respect to those documents. We hold that it does not.

Plaintiff, after issuing a Vehicle Residual Value Protection Policy to nonparty First Union Corporation, entered into Quota

Reinsurance Agreements with defendants and their predecessors. The pertinent provisions of the reinsurance agreements provided that any loss settlement made by the plaintiff shall be "unconditionally binding upon the Reinsurer in proportion to its participation." Moreover, plaintiff retained "absolute discretion" in the settlement of any claims. Finally, the agreements contained a boilerplate Access to Records clause which provided: "the Reinsurers ... will have the right to inspect ... all records of the Company [i.e. plaintiff] that pertain in any way to this Agreement."

In March 2000, First Union sued plaintiff herein. Periodically, ***279** plaintiff sent updates on the litigation to the defendants. This litigation was settled on February 25, 2003 for $226 million. On March 10, 2003, plaintiff asked defendants to contribute their share of the settlement. Defendants invoked the access to records clause in the agreement and demanded to inspect plaintiff's files, including the files of in-house and outside counsel. Plaintiff produced 22 banker's boxes of documents but refused to produce the files of counsel, claiming these were privileged documents and not subject to the access to records clause. As a result of plaintiff's failure to produce all the documents demanded, defendants refused to pay their share of the First Union settlement. Plaintiff then commenced this lawsuit.

Defendants commenced a separate lawsuit for rescission of the Reinsurance Agreements. They also claimed the First Union settlement was unreasonable, in bad faith and *ex gratia.* Both lawsuits were consolidated. During the course of those suits, defendants served document demands on plaintiff which sought documents that normally would be clearly privileged, involving litigation strategy in the First Union action, counsel opinions and communications between plaintiff and its counsel. Plaintiff objected to these demands and defendants moved to strike those objections and compel discovery. The IAS court granted the motion to compel discovery, holding that the access to records clause "is an extremely expansive clause without any limitation." This appeal ensued.

Initially, we note that plaintiff correctly argues that a de novo standard of review applies because the IAS court interpreted a contract provision (i.e., the access to records clause) as a matter of law (*see Gregoris Motors, Inc. v. Nissan Motor Corp.,* 80 A.D.2d 631, 436 N.Y.S.2d 90 [1981], *affd.* 54 N.Y.2d 634, 442 N.Y.S.2d 505, 425 N.E.2d 893 [1981]). Further, contrary to plaintiff's contention, defendants may seek rescission and damages in the same action (CPLR 3002[e]).

Access to records provisions in standard reinsurance agreements, no matter how broadly phrased, are not intended to act as a per se waiver of the attorney-client ****46** or attorney work product privileges. To hold otherwise would render these privileges meaningless *(North River Insurance Co. v. Philadelphia Reinsurance Corp.,* 797 F.Supp. 363 [D.N.J. 1992]).

The court in *North River* was presented with a cooperation clause which provided that the insurer would provide to the reinsurer "any of its records relating to this reinsurance or claims in connection therewith" (*id.* at 368). When the insurer refused to provide documents which it argued were within the purview of the attorney-client privilege, the reinsurer made a motion to compel production of those documents. The court ***280** held that so long as the insurer produced all documents in its possession relevant to the underlying claim, its duty under the cooperation clause was fulfilled. It further held that the reinsurer is not entitled under a cooperation clause to learn of any and all legal advice that may have been obtained "with a reasonable expectation of confidentiality" (*id.* at 369). In short, the court determined that a standard document production clause, does not, without more, constitute a waiver of the attorney-client privilege.

Indeed, the court also found that there was no automatic waiver of the attorney-client privilege merely because the parties had a common interest in the outcome of the underlying litigation. Production of documents under those circumstances does not prevent the assertion of privilege of similar documents in an adversary situation. Given the present dispute between the parties, the "attorney-client privilege was not waived by the promise of open 'records' alone" (*U.S. Fire Insurance Co. v. Phoenix Assur. Co.,* Sup. Ct., N.Y. County, Aug. 18, 1992, Moskowitz, J., Index No. 7712/91, *affd.* 193 A.D.2d 559, 598 N.Y.S.2d 938 [1993]).

That is not to say that the defendants are precluded from challenging the assertion of privilege made with respect to any documents sought to be produced, or that a court is bound by counsel's characterization of a document as being privileged (*see Aetna Cas. and Sur. Co. v. Certain Underwriters at Lloyd's,* 263 A.D.2d 367, 692 N.Y.S.2d 384 [1999], *lv. dismissed* 94 N.Y.2d 875, 705 N.Y.S.2d 6, 726 N.E.2d 483 [2000]). The party asserting the privilege has the burden of proving each element of the privilege claimed (*see Priest v. Hennessy,* 51 N.Y.2d 62, 431 N.Y.S.2d 511, 409 N.E.2d 983 [1980]). While a court may determine certain documents to be outside the purview of privileged documents, it cannot be said that the contract provision here constituted a blanket waiver of those privileges under all circumstances.

All Citations

13 A.D.3d 278, 788 N.Y.S.2d 44, 2004 N.Y. Slip Op. 09683

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6 N.Y.3d 437
Court of Appeals of New York.

In the Matter of M.B.
Mental Hygiene Legal Service, Appellant;
Staten Island Developmental Disabilities Services Office et al., Respondents.

March 23, 2006.

Synopsis
Background: Legal services organization brought action on behalf of mentally retarded, terminally ill ward, seeking determination that guardian did not have authority to withhold or withdraw life-sustaining treatment from ward. The Surrogate's Court, Richmond County, John Fusco, S., 2 Misc.3d 328, 773 N.Y.S.2d 206, denied petition. Organization appealed. The Supreme Court, Appellate Division, reversed, 21 A.D.3d 28, 797 N.Y.S.2d 510, and leave to appeal was granted.

Holdings: The Court of Appeals, Graffeo, J., held that:

case was not moot despite ward's death, and

Health Care Decisions Act for Mentally Retarded Persons granted existing guardians full health care decision-making authority for mentally retarded persons.

Appellate Division reversed.

Attorneys and Law Firms

***350** Mental Hygiene Legal Service, Mineola (Lisa Volpe, Sidney Hirschfeld and Dennis B. Feld of counsel), for appellant.

Eliot Spitzer, Attorney General, New York City (Jean Lin, Caitlin Halligan and Daniel Smirlock of counsel), for respondent.

***439 **795 OPINION OF THE COURT**

GRAFFEO, J.

Under the Health Care Decisions Act for Persons with Mental Retardation, a guardian can make health care decisions for a mentally retarded person, including the decision to terminate life-sustaining medical treatment, under carefully prescribed circumstances. The issue in this case—solely one of statutory interpretation—is whether the Act applies only to guardians appointed after its March 2003 effective date or whether it also affects the authority of persons already serving as guardians

before March 2003. Based on the language and history of the Act, we conclude that the Legislature also granted existing guardians full health care decision-making authority, subject to the detailed procedures set forth in the statute.

Background

Under New York common law, a competent adult generally has the right to make health care decisions, including the right to refuse life-sustaining treatment (*see Matter of Fosmire v. Nicoleau,* 75 N.Y.2d 218, 551 N.Y.S.2d 876, 551 N.E.2d 77 [1990]). If the individual suffers an illness or injury resulting in a loss of decision-making capacity, family and friends may obtain a court order authorizing the cessation of treatment if they can prove—by clear and convincing evidence of the patient's previously-expressed views—that the individual would have refused life-sustaining treatment if capable of making that decision (*id.* at 225, 551 N.Y.S.2d 876, 551 N.E.2d 77).[1]

***440** Although a guardian of a mentally retarded person was imbued under the common law with the authority to make abroad spectrum of health care decisions, this authority did not encompass the power to end life-sustaining medical treatment. Viewing the guardian's role as comparable to that of a parent—who could not deprive a child of lifesaving treatment—this Court concluded in *Matter of Storar,* 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64 [1981], *cert. denied* 454 U.S. 858, 102 S.Ct. 309, 70 L.Ed.2d 153 [1981] that the guardian of a 52–year–old mentally retarded man lacked the authority to order the cessation of blood transfusions. Predicating our analysis on principles developed under the common law, we indicated that the Legislature could establish procedures governing the discontinuance of life-sustaining ****796 ***351** treatment for incompetent individuals if it determined this was desirable or appropriate, noting that any "change should come from the Legislature" (*id.* at 383, 438 N.Y.S.2d 266, 420 N.E.2d 64).

In the wake of *Storar*, a distinction arose between the common-law rights of competent adults, who could make their wishes concerning end-of-life care known to family and friends, and mentally retarded persons who had never been competent to make their own health care decisions and for whom life-sustaining treatment could not be refused. When these mentally retarded individuals became irreversibly, terminally ill they were, in effect, ineligible for hospice or other palliative care because their guardians were unable to refuse more intrusive, acute medical treatments aimed at extending life for as long as possible.

As a consequence of this disparity, family members, caregivers and advocacy groups for the mentally retarded sought relief from the Legislature. They shared the stories of mentally retarded patients forced to suffer painful, intrusive life-sustaining medical treatments after it was clear that they would never regain any quality of life because the requests of their guardians (usually parents or siblings) to end life-sustaining measures could not be honored. This was the situation the Legislature sought to remedy when it enacted the Health Care Decisions Act for Persons with Mental Retardation (HCDA) (*see* Bill Jacket, L. 2002, ch. 500).

***441** The Statutory Scheme

The HCDA was passed by both houses and signed by the Governor in the fall of 2002 but it did not become effective until 180 days later—March 16, 2003 (L. 2002, ch. 500, § 4). The legislation added a new subdivision to Surrogate's Court Procedure Act § 1750, the provision that addresses the guardianship of mentally retarded persons. Before the enactment of the HCDA, section 1750 stated that, upon the certification of appropriate medical personnel that a mentally retarded person was "incapable to manage him or herself and/or his or her affairs by reason of mental retardation and that such condition is permanent in nature or likely to continue indefinitely," a guardian "of the person or of the property or of both" could be appointed (SCPA 1750[1]). A guardianship "of the person" was viewed as authorizing some degree of medical decision-making power, but the scope of this authority was unclear, particularly in the aftermath of *Storar*.

The new provision—SCPA 1750(2)—imposes an additional certification requirement, clearly applicable to all future guardianship proceedings. Along with filing a certification from medical professionals that the mentally retarded person is

incapable of managing his or her affairs, prospective guardians now must also file a "specific determination by such [medical personnel] as to whether the mentally retarded person has the capacity to make health care decisions, as defined by [Public Health Law § 2980(3)], for himself or herself" (SCPA 1750[2]). In the event the mentally retarded individual has the ability to make health care decisions, the HCDA allows a guardian to be appointed to make other types of decisions. If not, the guardian is granted full medical decision-making power. In the latter event, the HCDA removed any uncertainty concerning the scope of that authority, clarifying that health care decisions include "any decision to consent or refuse to consent to health care" (*see* SCPA 1750–b [1], cross-referencing Public Health Law § 2980[6]). Thus, under the HCDA, a guardian can, under certain circumstances, order the cessation of life-sustaining medical treatment for a mentally retarded person who ****797 ***352** never had capacity to make such a decision.

The HCDA also amended article 17–A of the Surrogate's Court Procedure Act by adding a new section 1750–b governing health care decision-making for mentally retarded persons. Section 1750–b establishes a "[d]ecision-making standard" requiring that guardians base all health care decisions "solely and ***442** exclusively on the best interests of the mentally retarded person and, when reasonably known or ascertainable with reasonable diligence, on the mentally retarded person's wishes, including moral and religious beliefs" (SCPA 1750–b [2][a]). This provision lists the factors that must be considered in determining the mentally retarded person's best interests, which include "the dignity and uniqueness" of the individual; "the preservation, improvement or restoration of the ... person's health"; "the relief of the mentally retarded person's suffering by means of palliative care and pain management"; the effect of treatment, including artificial nutrition and hydration, on the mentally retarded person; and the patient's overall medical condition (SCPA 1750–b [2][b]). A medical decision cannot be based on financial considerations or a failure to afford the mentally retarded individual the respect that would be afforded any other person in the same circumstances (SCPA 1750–b [2][c]). In addition, the statute imposes on the guardian "the affirmative obligation to advocate for the full and efficacious provision of health care, including life-sustaining treatment" (SCPA 1750–b [4]), defined as "medical treatment which is sustaining life functions and without which, according to reasonable medical judgment, [the] patient will die within a relatively short time period" (*see* SCPA 1750–b [4], cross-referencing Mental Hygiene Law § 81.29[e]).

In the event a guardian contemplates the withdrawal or withholding of life-sustaining treatment, SCPA 1750–b imposes a decision-making procedure that must be followed before the decision can be carried out. The threshold requirement is that the mentally retarded person's physician confirm to a reasonable degree of medical certainty, after consultation with another physician or a licensed psychologist, that the person currently lacks the capacity to make health care decisions (SCPA 1750–b [4][a]). The attending physician and another concurring physician must further attest that the mentally retarded person has one of three types of conditions: a terminal condition, permanent unconsciousness or "a medical condition other than such person's mental retardation which requires life-sustaining treatment, is irreversible and which will continue indefinitely," and life-sustaining treatment imposes or would impose an extraordinary burden on the patient in light of the patient's medical condition and the expected outcome of the life-sustaining treatment (SCPA 1750–b [4][b][i], [ii]). In the case of the withdrawal or withholding of artificially provided nutrition or hydration, ***443** the two physicians must also confirm that "there is no reasonable hope of maintaining life" or that the artificial nutrition or hydration itself "poses an extraordinary burden" on the patient (SCPA 1750–b [4][b][iii]). These conclusions by medical professionals are a condition precedent to any valid decision to end life-sustaining treatment—without them, life-sustaining treatment must be afforded to the patient.

If the requisite medical conclusions are made, the next step is for the guardian to express a decision to end life-sustaining treatment either in writing, signed by a witness, or orally in the presence of the attending physician and another witness, and the decision must be included in the patient's chart. The physician can then ****798 ***353** issue the appropriate medical orders or object to the guardian's decision but, in either case, the decision to end life-sustaining treatment cannot be implemented for 48 hours (SCPA 1750–b [4][e]). During that time, the physician must notify various parties including, in some circumstances, the mentally retarded person. The Act grants a number of persons and organizations automatic standing to lodge an objection—the mentally retarded person, a parent or adult sibling, the attending physician, any other health care practitioner providing services to the patient, the director of a residential facility that formerly cared for the patient, the Commissioner of the Office of Mental Retardation and Developmental Disabilities (OMRDD), and, if the patient was treated in a residential facility, the Mental Hygiene Legal Service (MHLS) (SCPA 1750–b [5]).

Upon objection, the guardian's decision is suspended (unless the suspension would itself result in the death of the patient) while a judicial proceeding is conducted "with respect to any dispute arising under this section, including objecting to the

withdrawal or withholding of life-sustaining treatment because such withdrawal or withholding is not in accord with the criteria set forth in this section" (SCPA 1750–b [6]). If at the conclusion of the 48–hour period there is no objection the guardian's decision to withdraw or withhold life-sustaining treatment is put into effect, without judicial involvement.

Thus, the HCDA clarifies that guardians can make health care decisions for mentally retarded persons who themselves were never competent to make those decisions, including a decision to end life-sustaining treatment. But it imposes a series of procedural hurdles—intended to safeguard the interests of the patient and prevent an improvident decision by the guardian—that ***444** must be satisfied prior to the implementation of such a decision.

The issue now presented to us is whether the Legislature intended to authorize guardians appointed prior to the effective date of the HCDA to make health care decisions for mentally retarded persons in accordance with the Act's strict decision-making structure without having to obtain, through a separate judicial proceeding, an amended guardianship order that specifically recognizes their authority as encompassing the power to end life-sustaining treatment. We conclude that the Legislature did intend that authorization.

Facts

M.B., a profoundly retarded 42–year–old man with Down's syndrome who never possessed the capacity to make health care decisions, lived with his mother until her death in December 2002. In January 2003, M.B.'s brother R.B. was appointed his guardian under article 17–A of the Surrogate's Court Procedure Act. At that time, the HCDA had been passed but was not yet effective. The guardianship decree therefore named R.B. as "guardian of the person" of M.B. but the court did not specifically address R.B.'s authority to make health care decisions for M.B.

After his mother's death, M.B. lived in a residential facility specializing in the care of mentally retarded persons. He later became seriously ill and was transferred to Staten Island University Hospital where he was diagnosed with pneumonia, hypertension and hypoxia. His physical condition steadily declined to the point that he lost consciousness and was placed on a respirator, with a nasal-gastric tube inserted for feeding and hydration. M.B.'s physicians concluded that his illness was terminal, his condition irreversible and that the life-sustaining treatment currently being provided imposed a substantial burden on him. Based on the physicians' opinions ****799 ***354** concerning M.B.'s medical condition and prognosis, on October 14, 2003 R.B. requested that the respirator be disconnected, with the understanding that this would soon result in M.B.'s death. As required by the HCDA, the hospital notified various parties of the decision, including OMRDD and MHLS. The next day, MHLS filed a written notice of objection, which resulted in suspension of R.B.'s order to discontinue life-sustaining treatment.

Uncertain of how to proceed, R.B. and his sister appeared pro se in Richmond County Surrogate's Court on October 17, 2003, ***445** asking the Surrogate to authorize the hospital to honor R.B.'s request, but the matter was adjourned so that MHLS could initiate formal proceedings. By order to show cause and petition dated October 20, 2003, MHLS sought a declaration that R.B. lacked the authority to issue an order ending life-sustaining treatment because he was appointed guardian two months before the effective date of the HCDA. Having retained private counsel, R.B. opposed the objection. The New York Attorney General's office appeared on behalf of the Staten Island Developmental Disabilities Services Office (SIDDSO), a regional division of OMRDD.[2] Initially taking no position on the controversy, SIDDSO ultimately supported R.B.'s position.

At a proceeding three days later, MHLS asserted that it agreed with R.B.'s conclusion that the cessation of life-sustaining treatment would be in the best interests of M.B. and that it was satisfied that the guardian had complied with all of the procedural and substantive safeguards required under the HCDA. MHLS explained that its objection was not predicated on the facts of this particular case, but on its interpretation that the HCDA did not empower guardians appointed prior to March 16, 2003 to make decisions involving the cessation of life-sustaining treatment for mentally retarded persons. Rather, MHLS argued that these previously-appointed guardians could not exercise such authority unless they individually petitioned Surrogate's Court for an expansion of their guardianship power. As for the current dilemma facing M.B.'s guardian, MHLS contended that the proceeding could be converted into a guardianship expansion proceeding so that R.B. could be granted the authority to render end-of-life decisions for his brother.

R.B.'s attorney countered that it was evident from the plain language and history of the HCDA that the Legislature had intended to extend to all guardians, regardless of the date of appointment, the power to request the termination of life-sustaining treatment under the new procedures set forth in SCPA 1750–b. R.B. reasoned that, had the Legislature intended to require previously-appointed guardians to petition for new ***446** powers, it would surely have said so, rather than including language in the HCDA suggesting precisely the opposite.

Surrogate's Court rejected MHLS' objection, concluding that R.B. was empowered under the HCDA to order the cessation of life-sustaining treatment for his brother, even though R.B.'s guardianship order was issued before the effective date ****800 ***355** of the Act. Pursuant to the Surrogate's order, M.B. was removed from the respirator and died within hours.

Acknowledging that M.B.'s death mooted its objection, MHLS nonetheless pursued an appeal, contending that the case fell within the exception to the mootness doctrine as it was capable of repetition, likely to evade review and involved a substantial legal issue. Considering the appeal under the mootness exception, the Appellate Division reversed and granted MHLS' petition. Focusing on the legislative history of the HCDA, a majority of the Court held that the Legislature had not intended to extend to existing guardians the end-of-life decision-making powers now recognized in the HCDA. The majority was concerned that mentally retarded persons with guardians appointed prior to the effective date of the new legislation lacked an opportunity to have their capacity to make health care decisions specifically considered. If the legislation was interpreted to apply to all guardians, the majority believed that mentally retarded individuals who might be able to make such decisions for themselves would not be adequately protected. The Court therefore concluded that previously-appointed guardians must petition for enlargement of guardianship authority so that the capacity issue could be directly explored for each mentally retarded person. The dissent would have affirmed the order denying the objection, reasoning that the plain language of the HCDA indicated a legislative intent to authorize existing guardians to make all necessary health care decisions, including end-of-life decisions. The Appellate Division granted SIDDSO leave to appeal to this Court.[3]

After the Appellate Division ruling, both houses of the Legislature passed bills that, if enacted, would have altered the guardianship enlargement procedure envisioned by the Appellate Division majority (2005 N.Y. Senate Bill S 5803; 2005 N.Y. Assembly Bill A 8906). Both the Senate and Assembly sponsors of the new legislation stated that the legislative intent of the ***447** HCDA had been to retroactively confer full health care decision-making authority on the tens of thousands of existing guardians without a requirement that they seek new guardianship orders from the courts (Mem. in Support of Senator Hannon, Bill S 5803; Mem in Support of Assembly Member P. Rivera, Bill A 8906). Although he agreed with the sponsors' view of the scope of the HCDA, the Governor vetoed the legislation, concluding that the proposed amendment was premature in light of the pending appeal to this Court (Governor Pataki Veto Message No. 121 of 2005).

Analysis

Like the Appellate Division, we address this appeal under the exception to the mootness doctrine because the issue presented is substantial, likely to recur and involves a situation capable of evading review (*Matter of Hearst Corp. v. Clyne,* 50 N.Y.2d 707, 431 N.Y.S.2d 400, 409 N.E.2d 876 [1980]). Both SIDDSO and MHLS emphasize that this case presents an issue of statutory interpretation. MHLS did not contend below and does not assert here that there is any constitutional impediment to interpreting the legislation in the manner urged by SIDDSO. As such, our task—as it is in every case involving statutory interpretation—is to ascertain the legislative intent and construe the pertinent statutes to effectuate that intent.

We begin with the statutory text, which is the clearest indicator of legislative ****801 ***356** purpose (*Majewski v. Broadalbin–Perth Cent. School Dist.,* 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 696 N.E.2d 978 [1998]). If the "language ... is clear and unambiguous, courts must give effect to its plain meaning" (*State of New York v. Patricia II.,* 6 N.Y.3d 160, 162, 811 N.Y.S.2d 289, 844 N.E.2d 743 [2006], quoting *Matter of Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of Town of Huntington,* 97 N.Y.2d 86, 91, 735 N.Y.S.2d 873, 761 N.E.2d 565 [2001]). When the terms of related statutes are involved, as is the case here, they must be analyzed in context and in a manner that "harmonize[s] the related provisions ... [and] renders them compatible" (*Tall Trees,* 97 N.Y.2d at 91, 735 N.Y.S.2d 873, 761 N.E.2d 565).

In this case, SIDDSO relies on two provisions of the HCDA as evidence that the Legislature intended to grant existing guardians the right to make end-of-life decisions. First, SIDDSO points to the new subdivision added to SCPA 1750. After directing that guardianship proceedings include a certification by medical personnel concerning the mentally retarded person's capacity to make health care decisions, the Legislature provided: "The absence of this determination in the case of guardians appointed ***448** prior to the effective date of this subdivision shall not preclude such guardians from making health care decisions" (SCPA 1750[2]). The Legislature thus explicitly exempted existing guardians from the new requirement that guardianship proceedings specifically address the mentally retarded person's capacity to make health care decisions.

Second, SIDDSO cites the language in the first subdivision of the new SCPA 1750–b, entitled "Scope of authority," which provides:

> "*Unless specifically prohibited by the court after consideration of the determination, if any, regarding a mentally retarded person's capacity to make health care decisions,* which is required by section [1750] of this article, *the guardian of such person appointed pursuant to section [1750] of this article shall have the authority to make any and all health care decisions, as defined by [Public Health Law § 2980(6)], on behalf of the mentally retarded person that such person could make if such person had capacity.* Such decisions may include decisions to withhold or withdraw life-sustaining treatment, as defined in [Mental Hygiene Law § 81.29(e)]. The provisions of this article are not intended to permit or promote suicide, assisted suicide or euthanasia; accordingly, nothing in this section shall be construed to permit a guardian to consent to any act or omission to which the mentally retarded person[ ] could not consent if such person had capacity" (SCPA 1750–b [1] [emphasis added]).

We agree with SIDDSO that the phrasing of the first sentence of section 1750–b (1) is telling—not only in what it says but also in what it does not say. The Legislature did not declare that a guardian has authority to make medical decisions only if the court has expressly authorized the guardian to do so—language one would expect to find if the Legislature had intended to require existing guardians to petition for enlargement of their power as MHLS maintains. Instead, the Legislature has provided that all guardians "*have* the authority to make any and all health care decisions," "[u]nless specifically prohibited by the court" (SCPA 1750–b [1] [emphasis added]).

The phrase "if any" in the beginning of section 1750–b (1) further illuminates the legislative intent. Since guardians appointed after the effective date of the HCDA must include a certification ***449** concerning siotificati certificationconcerning ****802 ***357** the mentally retarded person's health care decision-making capacity, this clause—which clarifies that health care decisions can be made even in the absence of such certification—can only be understood as referring to the authority of existing guardians who would not have obtained this certification. This interpretation of section 1750–b (1) is consistent with the clear statement in the newly-added section 1750(2) exempting guardians appointed prior to the effective date of the HCDA from the specific health care decision-making competency certification requirement. Read together, sections 1750(2) and 1750–b (1) reflect the intention of the Legislature to authorize guardians appointed prior to March 16, 2003 to make end-of-life decisions, provided those decisions are made pursuant to the exacting procedures specified in section 1750–b. The legislation does not indicate that existing guardians are to petition for new guardianship orders specifically expanding their health care decision-making authority.

The legislative history of the HCDA supports this construction. The Assembly sponsor stated that the purpose of the bill was to "allow the legally appointed guardians of mentally retarded individuals to have the authority to make medical decisions on behalf of such person, including decisions dealing with the withdrawal or withholding of life-sustaining treatment" (Mem. in Support of Assembly Member Luster, 2002 N.Y. Assembly Bill A 8466D [N.Y. State Legis. Retrieval Sys.]). In his memorandum in support, the Senate sponsor repeatedly notes that the legislation was not viewed as a significant change in the law but was a clarification of the power the Legislature had always intended guardians of mentally retarded persons to possess under SCPA article 17–A. The sponsor stated: "This bill clarifies that guardians of persons with mental retardation have the authority to make health care decisions, including decisions regarding life-sustaining treatment under certain circumstances" (Mem. of Senator Hannon in Support of N.Y. Senate Bill S 4622B, 2002 N.Y. Legis. Ann., at 279). Echoing the language in the legislation, the Senate sponsor asserted that guardians "have the authority"—not that guardians must now seek to obtain health care decision-making authority. He described the purpose of the legislation as follows:

> "In general, the bill reflects four overarching motives: (1) to clarify that decisions regarding life-sustaining treatment are part of the natural continuum ***450** of all health care decisions, (2) to allow decisions to end life-sustaining treatment only where the need is clearest ..., (3) to utilize existing legal standards wherever possible, and (4) *to maintain judicial oversight*

of close decisions, with a statutory structure incorporating a workable standard for the court" (*id.* at 280 [emphasis added]).

Thus, the role of the courts is described as "oversight of close decisions" relating to medical treatment, a clear reference to the objection process and resulting judicial proceeding referenced in section 1750–b (5) and (6).

The Commission on Quality of Care for the Mentally Disabled likewise observed that the bill would "clarify that guardians can make medical decisions on behalf of persons with mental retardation based upon the best interests and reasonably known wishes of the person[s] ... including, when appropriate, withdrawal of life-sustaining treatment" (Letter from Commn. on Quality of Care for Mentally Disabled to Counsel to Governor, Bill Jacket, L. 2002, ch. 500, at 10). Nowhere in the extensive Bill Jacket is there any suggestion that the Legislature intended previously-appointed guardians to have to initiate new court proceedings in order to ****803 ***358** acquire such authority. Such an interpretation would be inconsistent with the Legislature's repeatedly expressed view that it was clarifying the powers it vested in article 17–A guardians of mentally retarded persons, notwithstanding this Court's holding in *Storar*.

To be sure, the HCDA imposes a new obligation on guardians appointed after its effective date that was not—and is not—applicable to previously-appointed guardians. In addition to the long-standing requirement that medical personnel certify that the mentally retarded person is "incapable to manage him or herself and/or his or her affairs" (SCPA 1750[1])—a certification all previously-appointed guardians would have filed—the HCDA now requires that prospective guardians also file a certification by medical personnel specifically addressing the mentally retarded person's capacity to make health care decisions (SCPA 1750[2]). Previously-appointed guardians are expressly exempted from filing this health care capacity certification (SCPA 1750[2]).

It does not follow—as MHLS argues—that the Act must be construed to require existing guardians to obtain new appointment orders because any other interpretation would be inconsistent with the Legislature's overriding concern that the rights ***451** of mentally retarded persons, including those capable of making health care decisions, be protected. This argument turns on the assumption that the Legislature's decision to add a health care capacity certification requirement to the guardianship appointment procedure going forward indicated a belief that the former procedure was inadequate. This assumption is not supported by the statutory scheme or the pertinent legislative history. After all, each existing guardian was appointed based on a certification that the mentally retarded person was "incapable to manage him or herself and/or his or her affairs" (SCPA 1750[1]). And the history shows that the Legislature did not view the prior appointment procedure as flawed—it merely sought to clarify the decision-making powers of future guardians.

Critically, the HCDA does not exempt previously-appointed guardians from any of the strict SCPA 1750–b procedures governing specific health care decision-making, including end-of-life decision-making. If a guardian seeks to withhold or withdraw life-sustaining treatment, the threshold step in the statutory decision-making structure is the requirement that the patient's attending physician, in consultation with at least one other medical professional, confirm that the patient lacks the capacity to make health care decisions (SCPA 1750–b [4][a]). Because it requires two health care professionals to assess the mentally retarded person's capacity to make health care decisions, this requirement mimics the health care capacity certification undertaken in new guardianship proceedings. Thus, newly-appointed guardians will have to address the health care capacity issue twice (when initially appointed and again when making end-of-life decisions) while previously-appointed guardians will do so only when making a specific decision to end life-sustaining treatment. But the fact remains that the capacity of each mentally retarded person to make health care decisions will be explored before any decision by any guardian to end life-sustaining treatment is implemented, no matter when the guardian was appointed. In every meaningful respect, the authority of existing and newly-appointed guardians is exercised in an identical fashion under the HCDA because all guardians must comply with each step of the decision-making structure in SCPA 1750–b.

*****359 **804** MHLS reads the first clause in the new section 1750–b (1)—"[u]nless specifically prohibited by the court"—as preserving the court's supervisory role over medical decision-making by guardians. This is true. Going forward, under the health care ***452** capacity certification process applicable to guardians appointed after the effective date of the HCDA, courts must consider the mentally retarded person's capacity to make health care decisions and, in appropriate cases, may limit the guardian's authority in that realm. Moreover, courts are clearly empowered to resolve disputes concerning particular health care decisions made by guardians. But, by choosing to phrase the power granted guardians expansively—stating that they have health care decision-making authority unless the court specifically states otherwise—the Legislature recognized that guardians already possess that authority.

MHLS attempts to limit the import of the phrase "if any" in section 1750–b (1), arguing that it means only that existing guardians—who it claims must petition the court to expand their powers—are relieved from filing the specific health care capacity certification that new guardians must file under SCPA 1750(2). But this interpretation undercuts the primary premise of MHLS' argument—that the Legislature could not have intended to authorize all guardians, even those appointed prior to the HCDA, to make health care decisions in the absence of certifications specifically addressing health care decision-making capacity. If, as MHLS suggests, the Legislature meant for existing guardians to apply for expansion of their power to specifically encompass health care decision-making, why did it expressly exempt them from the central requirement of that procedure by dispensing with the certification process through which the capacity of the mentally retarded person is determined?

In essence, MHLS suggests that SIDDSO's interpretation of the HCDA cannot be effectuated because this would result in distinctions between the obligations of existing and future guardians. However, MHLS relies on a construction that also treats previously-appointed guardians differently from new guardians since MHLS recognizes that SCPA 1750(2) relieves the former from the health care decision-making capacity certification requirement. Since both parties proffer interpretations that result in differences between the two classes of guardians, the presence of such distinctions does not itself provide us with a basis to resolve the controversy.

The Legislature made a policy decision that newly-appointed guardians need to meet a specific health care capacity ***453** certification requirement. Given the thousands of previously-appointed guardians, state lawmakers chose not to impose the new capacity certification requirement on existing guardians or otherwise require them to commence court proceedings seeking expansion of guardianship authority. In light of the significant procedural protections afforded in SCPA 1750–b, the Legislature concluded that the rights of mentally retarded persons would be safeguarded absent such a requirement.

MHLS is certainly correct that the HCDA provides for judicial oversight of end-of-life decisions by guardians. But, in the case of previously-appointed guardians, such judicial oversight occurs when a guardian reaches an end-of-life decision, the necessary parties are notified, and someone objects to the decision. The Legislature determined that it would serve no significant purpose to require each previously-appointed guardian to commence proceedings for the expansion of health care decision-making authority (which would have to occur even if no issue concerning ****805 ***360** end-of-life decision-making is pending or even likely to arise) given the procedural steps all guardians must follow under SCPA 1750–b, which includes an inquiry into the mentally retarded person's capacity to make health care decisions.

MHLS responds that this inquiry is not equivalent to the initial guardianship certification process contemplated under the new SCPA 1750(2) because it occurs after the mentally retarded person is in medical crisis and therefore fails to adequately account for the possibility that the patient might once have had the capacity to make health care decisions. But whether judicial intervention is sought in the context of a guardianship expansion proceeding or a SCPA 1750–b objection, the court must render a determination based on the present capacity of the mentally retarded person—not abilities the patient may have once possessed. MHLS' contrary view of the statute would, in effect, prevent any existing guardian from obtaining the power to withdraw life-sustaining treatment if the patient was already in a terminal medical crisis when the HCDA became effective, excluding a class of patients—ironically, those in immediate need of the rights afforded by the legislation—from the protections of the HCDA, a result not intended by the Legislature.[4]

***454** Moreover, in circumstances where the mentally retarded person formerly had some capacity to make medical decisions, the guardian is nonetheless required to base medical decision-making "on the best interests of the mentally retarded person and, when reasonably known or ascertainable with reasonable diligence, on the mentally retarded person's wishes, including moral and religious beliefs" (SCPA 1750–b [2][a]). Thus, the wishes of a mentally retarded individual who once had capacity to make health care decisions are not disregarded under the new statutory scheme.

In sum, while MHLS and the Appellate Division are understandably concerned that the interests of mentally retarded individuals be scrupulously protected, the Legislature designed the statutory scheme to meet that important objective. First, SCPA 1755 authorizes any person (including a mentally retarded person) at any time to seek judicial review of the scope of a guardianship order and "request[ ] modification of such order in order to protect the mentally retarded ... person's ... personal interests." In other words, even prior to the enactment of the HCDA, the authority granted a guardian with respect to a particular mentally retarded person was subject to judicial review in the event of a concern regarding the guardian's exercise

of any aspect of that authority, including health care decision-making. The HCDA did not alter this procedure. As such, a mentally retarded individual who has health care decision-making capacity—or any party on his or her behalf, including MHLS—may petition the court for curtailment of the existing guardian's power in that arena.

Second, as this case demonstrates, the notification and objection process in SCPA 1750–b provides substantial protection to mentally retarded patients. Guardians must base health care decisions on the advice of qualified medical professionals and must follow a multistep procedure before any end-of-life decision will be honored by a health care facility. In any case ****806 ***361** where a disagreement arises between the guardian and one of a host of other interested parties (family members, the patient's medical caregivers, OMRDD, a residential director of a facility or MHLS), the statute mandates that the conflict be resolved by the courts. MHLS does not dispute the efficacy of this procedure, nor does it assail the Legislature's choice not to require ***455** judicial approval of health care decisions in circumstances where all parties agree that the guardian is acting in the mentally retarded individual's best interests. Although the Legislature could have charted a different course, the decision not to require previously-appointed guardians to seek new appointment orders was for the Legislature to make and, absent constitutional challenge, it must be upheld by this Court.

Accordingly, the order of the Appellate Division should be reversed, without costs, and the order of Surrogate's Court reinstated. The certified question should not be answered upon the ground that it is unnecessary.

Chief Judge KAYE and Judges G.B. SMITH, CIPARICK, ROSENBLATT, READ and R.S. SMITH concur.

Order reversed, etc.

All Citations

6 N.Y.3d 437, 846 N.E.2d 794, 813 N.Y.S.2d 349, 2006 N.Y. Slip Op. 02235

Footnotes

1 In addition to the rights recognized under the common law, a competent adult can, of course, relieve family and friends of the burden of seeking such a court order by executing a health care proxy pursuant to Public Health Law § 2981 naming a surrogate health care decision-maker who can make binding decisions in the event the appointing adult loses the capacity to make such decisions. A person can also express his or her wishes regarding life-sustaining treatment in what is known as a "living will."

2 SIDDSO is a division of the state Office of Mental Retardation and Developmental Disabilities. OMRDD operates 14 regional DDSOs in New York State, which coordinate and deliver services to mentally retarded and developmentally disabled individuals (and their families) whether they reside in state-operated facilities, group homes or family settings (OMRDD Information for Individuals and Families <http://www.omr.state .ny.us/hp_ individuals.jsp> [last updated Feb. 14, 2006], cached at <http:// www.courts. state.ny.us/reporter /webdocs/NYS-OMRDD _Families.htm>).

3 In granting leave, the Appellate Division certified the question: "Was the opinion and order of this court dated June 13, 2005, properly made?"

4 In this case, MHLS took the position that R.B. could apply for enlarged guardianship powers under SCPA 1750(2), thereby obtaining authority to make medical decisions for M.B. and to withdraw life-sustaining treatment, even though M.B. was already in medical crisis, urging the court to pursue this procedural route rather than the objection procedure set forth in SCPA 1750–b (5) and (6).

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61 A.D.3d 13
Supreme Court, Appellate Division, Second Department, New York.

KINGSBROOK JEWISH MEDICAL CENTER, as assignee of Thresiamm Valiyaparambil, et al., respondents,
v.
ALLSTATE INSURANCE COMPANY, appellant.

Jan. 20, 2009.

Synopsis
Background: Medical center, as assignee of patient, brought action against patient's insurer, seeking to recover no-fault medical benefits. The Supreme Court, Nassau County, Geoffrey J. O'Connell, J., granted medical center's summary judgment motion. Insurer appealed.

Holdings: The Supreme Court, Appellate Division, Dillon, J., held that:

diagnosis and procedure codes key published by Health and Human Services (HHS) would be judicially noticed, and

insurer failed to demonstrate lack of causation between automobile accident and patient's treatment.

Affirmed.

Attorneys and Law Firms

****681** Stern & Montana, LLP, New York, N.Y. (Richard Montana of counsel), for appellant.

Joseph Henig, P.C., Bellmore, N.Y., for respondents.

STEVEN W. FISHER, J.P., MARK C. DILLON, HOWARD MILLER, and RANDALL T. ENG, JJ.

Opinion

DILLON, J.

***14** We are asked to determine whether the definition of diagnosis and procedure codes adopted by the United States Department of Health and Human Services (hereinafter HHS) as part of its regulatory authority may be a proper subject for judicial notice under CPLR 4511. If so, we must also determine whether the defined diagnostic codes, in and of themselves, permit a finding that a patient's hospital care and treatment is wholly outside the scope of no-fault automobile coverage. Until now, we are not ***15** aware of any appellate court that has addressed the issue of whether the diagnosis and procedure codes key of the United States. government can be judicially noticed by courts, so that it may then be used to decipher no-fault billing forms.

I. *Relevant Facts*

On July 3, 2006, George Hafford was injured in an automobile accident and received treatment at the defendant White Plains Hospital Center (hereinafter White Plains Hospital), from the date of the accident until August 22, 2006. Hafford was insured by the defendant, Allstate Insurance Company (hereinafter Allstate), under an automobile liability insurance policy that contained a no-fault endorsement. White Plains Hospital rendered a bill for its services to Hafford in the total sum of $26,979.83. Hafford assigned to White Plains Hospital the right to seek reimbursement from Allstate for the amount billed

On November 7, 2006, White Plains Hospital, as assignee of Hafford, mailed to Allstate by certified mail, return receipt requested, NF–5 and UB–92 forms demanding payment of the sum of $26,979.83. The UB–92 form contained code numbers to identify the diagnoses that had been made of Hafford's conditions and the treatments provided to him in furtherance of the diagnoses. The delivery of the forms to Allstate on November 8, 2006 is not at issue. White Plains Hospital alleges that pursuant to Insurance Law § 5106(a) and 11 NYCRR 65–3.8(a)(1), Allstate's payment of no-fault benefits became due on December 8, 2006, but Allstate failed to make payment or issue a Denial of Claim.

This action ensued. Allstate's answer to the complaint set forth 11 affirmative defenses, including the "fourth" affirmative defense that the injuries for which Hafford received treatment did not arise out of the use or operation of an insured motor vehicle and, as such, are not covered by its policy of insurance.

The plaintiffs moved for summary judgment, submitting, in connection with the third cause of action asserted by White Plains Hospital, documentary evidence to ****682** establish the service by White Plains Hospital upon Allstate of the required billing documents for no-fault reimbursement and Allstate's failure to either pay the claim or issue an appropriate denial. Allstate opposed the motion and, by cross motion, sought summary judgment in its favor dismissing the complaint. With respect to third cause of action asserted by White Plains Hospital, Allstate ***16** argued that it was entitled to summary judgment on the ground that the treatment afforded to Hafford was unrelated to his motor vehicle accident. Specifically, Allstate's counsel provided the court with the diagnosis and procedure codes from the official website of HHS, Centers for Medicare and Medicaid Services. Allstate requested that the Supreme Court take judicial notice of the codes and their definitions, as public documents. According to the codes key, Hafford's diagnoses and treatment at White Plains Hospital included rapid heart rate associated with infection, acute and chronic respiratory failure, heart damage caused by alcoholism, convulsions, potassium deficiency, blood poisoning, brain damage caused by lack of oxygen, and expectoration of blood. Allstate's counsel argued, without a supporting affidavit from a medical expert, that these code-defined conditions could not have been related to the automobile accident or, at least, raised an issue of fact as to whether the conditions arose from the accident.

The plaintiffs opposed Allstate's cross motion for summary judgment by raising two principal arguments in connection with the third cause of action. First, White Plains Hospital argued that the interpretation of the billing codes cannot be judicially noticed as it does not rest upon knowledge or sources widely accepted as unimpeachable. Second, White Plains Hospital argued that Allstate's counsel was not qualified as a medical expert to render an opinion on whether the hospital's care and treatment was, or was not, related to the underlying automobile accident.

In the order appealed from dated November 15, 2007, the Supreme Court held, with respect to the third cause of action, that White Plains Hospital established its demand upon proper forms that Allstate pay the sum of $26,979.83, and that Allstate failed to pay the claim or issue a Denial of Claim within the required 30 days thereafter. With respect to Allstate's opposition and the cross motion, the Supreme Court implicitly took judicial notice of the HHS codes key and held that counsel's affirmation, which argued that invoiced treatment was unrelated to the automobile accident, was medically insufficient. The Supreme Court, inter alia, granted that branch of the plaintiffs' motion which was for summary judgment on the third cause of action asserted by White Plains Hospital. For the reasons set forth below, we affirm the order insofar as appealed from.

***17** II. *The Payment of First Party Benefits Under Insurance Law § 5106*

Article 51 of the New York Insurance Law is known as the "Comprehensive Motor Vehicle Insurance Reparations Act" and is commonly referred to as the "No–Fault Law." The purpose and objective of this statute is to " 'assure claimants of

expeditious compensation for their injuries through prompt payment of first-party benefits without regard to fault and without expense to them' " (*New York Hosp. Med. Ctr. of Queens v. Motor Veh. Acc. Indem. Corp.,* 12 A.D.3d 429, 430, 784 N.Y.S.2d 593, quoting *Dermatossian v. New York City Tr. Auth.,* 67 N.Y.2d 219, 225, 501 N.Y.S.2d 784, 492 N.E.2d 1200).

Section 5106 of article 51 is entitled "Fair Claims Settlement" and provides, in pertinent part, that:

> ****683** "(a) Payments of first party benefits and additional first party benefits shall be made as the loss is incurred. Such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained. If proof is not supplied as to the entire claim, the amount which is supported by proof is overdue if not paid within thirty days after such proof is supplied. All overdue payments shall bear interest at the rate of two percent per month. If a valid claim or portion was overdue, the claimant shall also be entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to limitations promulgated by the superintendent in regulations."

Pursuant to the statutory and regulatory framework governing the payment of no-fault benefits, insurance companies are required either to pay or deny a claim for first-party benefits within 30 days of receipt of the claim (*see* Insurance Law § 5106[a]; 11 NYCRR 65–3.8[a][1]; 65–3.8[c]; *Fair Price Med. Supply Corp. v. Travelers Indem. Co.,* 10 N.Y.3d 556, 563, 860 N.Y.S.2d 471, 890 N.E.2d 233; *Hospital for Joint Diseases v. New York Cent. Mut. Fire Ins. Co.,* 44 A.D.3d 903, 844 N.Y.S.2d 371; *New York & Presbyt. Hosp. v. Progressive Cas. Ins. Co.,* 5 A.D.3d 568, 569, 774 N.Y.S.2d 72). Within 10 business days after receipt of the claim notice, the insurer may send an initial request for verification of the claim (*see* 11 NYCRR 65–3.5[a]). After receipt of verification, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt (*see* 11 NYCRR 65–3.5[b]). The 30–day period in which to either pay or deny a claim is ***18** extended where the insurer makes a request for additional verification within the requisite 15–day time period (*see Montefiore Med. Ctr. v. Government Empls. Ins. Co.,* 34 A.D.3d 771, 826 N.Y.S.2d 616; *New York & Presbyt. Hosp. v. Allstate Ins. Co.,* 31 A.D.3d 512, 818 N.Y.S.2d 583). Thus, a timely additional verification request tolls the insurer's time within which to pay or deny a claim (*see Fair Price Med. Supply Corp. v. Travelers Indem. Co.,* 10 N.Y.3d at 563, 860 N.Y.S.2d 471, 890 N.E.2d 233; *New York & Presbyt. Hosp. v. Countrywide Ins. Co.,* 44 A.D.3d 729, 730, 843 N.Y.S.2d 662).

Eleven years ago, the New York Court of Appeals carved out a narrow exception to the requirement that an insurer must pay or deny a claim within the 30–day period prescribed by the No–Fault Law. The Court of Appeals held that an insurer "may assert a lack of coverage defense premised on the fact or founded belief that the alleged injury does not arise out of an insured incident" (*Central Gen. Hosp. v. Chubb Group of Ins. Cos.,* 90 N.Y.2d 195, 199, 659 N.Y.S.2d 246, 681 N.E.2d 413; *see Fair Price Med. Supply Corp. v. Travelers Indem. Co.,* 10 N.Y.3d at 563, 860 N.Y.S.2d 471, 890 N.E.2d 233). The Court stressed, however, that the lack of coverage "exceptional exemption" does not apply where the insurer claims that the hospital treatments were medically excessive, since the defense of medical excessiveness seeks to excuse only part, but not all, of the no-fault benefits (90 N.Y.2d at 199, 202, 659 N.Y.S.2d 246, 681 N.E.2d 413). Thus, where an insurer alleges excessive treatment as a basis for denying coverage, a Denial of Claim must be served within the time-sensitive deadline of the No–Fault Law, at least as to the portion of the demand that is deemed excessive.

Two years later in *Mount Sinai Hosp. v. Triboro Coach,* 263 A.D.2d 11, 699 N.Y.S.2d 77, this Court applied the ****684** *Central General Hospital* rationale and, in so doing, explained that the insurer who asserts entitlement to the "exceptional exemption" must "come forward with proof in admissible form to establish 'the fact' or the evidentiary 'foundation for its belief' that the patient's treated condition was unrelated to his or her automobile accident" (*id.* at 19–20, 699 N.Y.S.2d 77). This Court determined that in applying *Central General Hospital,* "the question of whether an injury was entirely preexisting (i.e., not covered) or was in whole or in part the result of an insured accident (i.e., covered) is hybrid in nature, and cannot be resolved *without recourse to the medical facts* " (*id.* at 19, 699 N.Y.S.2d 77 [emphasis added]).

This Court further emphasized that the underlying purpose of the No–Fault Law would be undermined if a plaintiff hospital were required to prove as a threshold matter that a patient's ***19** condition was caused by the accident and unrelated to his or her entire medical history. Under such circumstances, "insurers would be motivated to refrain from issuing timely disclaimers in order to impose such an onerous threshold burden upon claimants" (*id.* at 20, 699 N.Y.S.2d 77). The burden of proving the lack of a nexus between an accident and medical treatment therefore falls upon the insurer seeking to deny payment (*id.* at 19–20, 699 N.Y.S.2d 77).

Against this backdrop, the judicially noticed admissibility of the proffered diagnosis and procedure codes key published by HHS, and whether the deciphered codes, if admitted, establish that medical diagnosis and treatment was or was not related in whole or in part to Hafford's automobile accident, assumes dispositive significance to the resolution of this appeal.

III. *Judicial Notice*

CPLR 4511(b) provides that upon request of a party, a court may take judicial notice of federal, state, and foreign government acts, resolutions, ordinances, and regulations, including those of their officers, agencies, and governmental subdivisions. While the concept of judicial notice is elastic (*see* Richardson on Evidence § 52 [10th ed.]) and applicable to a wide range of subject matter, official promulgations of government appear to be particularly appropriate for judicial notice, given the manner that CPLR 4511 expressly singles them out for such treatment.

Judicial notice has never been strictly limited to the constitutions, resolutions, ordinances, and regulations of government, but has been applied by case law to other public documents that are generated in a manner which assures their reliability. Thus, the concept has been applied to census data (*see Affronti v. Crosson,* 95 N.Y.2d 713, 720, 723 N.Y.S.2d 757, 746 N.E.2d 1049; *Buffalo Retired Teachers 91–94 Alliance v. Board of Educ. for City School Dist. of City of Buffalo,* 261 A.D.2d 824, 825, 689 N.Y.S.2d 562; *Mackston v. State of New York,* 126 A.D.2d 710, 510 N.Y.S.2d 912), agency policies (*see Matter of Albano v. Kirby,* 36 N.Y.2d 526, 532, 369 N.Y.S.2d 655, 330 N.E.2d 615), certificates of corporate dissolution maintained by the Secretary of State (*see Brandes Meat Corp. v. Cromer,* 146 A.D.2d 666, 667, 537 N.Y.S.2d 177), the resignation of public officials (*see Matter of Soronen v. Comptroller of State of N.Y.,* 248 A.D.2d 789, 791, 669 N.Y.S.2d 694; *Matter of Maidman,* 42 A.D.2d 44, 47, 345 N.Y.S.2d 82), legislative proceedings (*see Outlet Embroidery Co. v. Derwent Mills,* 254 N.Y. 179, 183, 172 N.E. 462), legislative journals (*see Browne v. City of New York,* 213 App.Div. 206, 233, 211 N.Y.S. 306), the consumer price index (*see* ***20** *Sommers v. Sommers,* 203 A.D.2d 975, 976, 611 N.Y.S.2d 971; *City of Hope v. Fisk Bldg. Assoc.,* 63 A.D.2d 946, 947, 406 N.Y.S.2d 472), the location of real property recorded ****685** with a clerk (*see Andy Assoc. v. Bankers Trust Co.,* 49 N.Y.2d 13, 23–24, 424 N.Y.S.2d 139, 399 N.E.2d 1160), death certificates maintained by the Department of Health (*see Matter of Reinhardt,* 202 Misc. 424, 426, 114 N.Y.S.2d 208), and undisputed court records and files (*see e.g. Perez v. New York City Hous. Auth.,* 47 A.D.3d 505, 850 N.Y.S.2d 75; *Walker v. City of New York,* 46 A.D.3d 278, 282, 847 N.Y.S.2d 173; *Matter of Khatibi v. Weill,* 8 A.D.3d 485, 778 N.Y.S.2d 511; *Matter of Allen v. Strough,* 301 A.D.2d 11, 18, 752 N.Y.S.2d 339). Even material derived from official government websites may be the subject of judicial notice (*see Munaron v. Munaron,* 21 Misc.3d 295, 862 N.Y.S.2d 796 [Sup. Ct. Westchester County 2008]; *Parrino v. Russo,* 19 Misc.3d 1127(A), 2008 WL 1915133 [Civ. Ct. Kings County 2008]; *Nairne v. Perkins,* 14 Misc.3d 1237(A), 2007 WL 656301 [Civ. Ct. Kings County 2007]; *Proscan Radiology of Buffalo v. Progressive Cas. Ins. Co.,* 12 Misc.3d 1176 (A), 2006 WL 1815210 [Buffalo City Ct. 2006]).

White Plains Hospital argues that the code key available on the HHS website does not qualify for judicial notice, by relying upon the language of this Court in *Ptasznik v. Schultz,* 247 A.D.2d 197, 679 N.Y.S.2d 665. In *Ptasznik,* then-Justice Albert Rosenblatt defined the test for judicial notice as "whether the fact rests upon knowledge or sources so widely accepted and unimpeachable that it need not be evidentiarily proven" (*id.* at 198, 679 N.Y.S.2d 665, citing *Hunter v. New York, Ontario & W.R.R. Co.,* 116 N.Y. 615, 23 N.E. 9). White Plains Hospital maintains that code numbers which require deciphering do not constitute general information widely accepted by the average lay person. However, *Ptasznik* discusses specifically, and the universe of case law recognizes generally, two disjunctive circumstances where information may be judicially noticed. The first is when information "rests upon *knowledge* [that is] widely accepted" (*Ptasznik v. Schultz,* 247 A.D.2d at 198, 679 N.Y.S.2d 665 [emphasis added]) such as calendar dates, geographical locations, and sunrise times (*id.* at 198, 679 N.Y.S.2d 665). The second "rests upon ... *sources* [that are] widely accepted and unimpeachable" (*id.* [emphasis added]), such as reliable uncontested governmental records.

Here, the diagnosis and procedure codes key maintained by the United States Government on its HHS website is of sufficient authenticity and reliability that it may be given judicial notice. The accuracy of the codes key is not contested by White Plains Hospital, and is not subject to courtroom factfinding (*see* ***21** *Affronti v. Crosson,* 95 N.Y.2d at 720, 723 N.Y.S.2d 757, 746 N.E.2d 1049). The fact that the code system might not be readily understood by the lay public is of no significance, as the information is proffered for judicial notice not on the basis of being generally understood by the public, but rather, on the basis of its reliable source.

We hold, therefore, that the diagnosis and procedure codes key published by the United States Government on its HHS website may properly be given judicial notice (*see* CPLR 4511[b]), as the key is reliably sourced and its accuracy not contested.

Using the codes key in evidence, the appellant, Allstate, accurately deciphered for the Supreme Court the medical diagnoses and treatments administered by White Plains Hospital to Hafford during the course of Hafford's hospital stay.

IV. *The Medical Evidentiary Value of the Deciphered Codes*

The plaintiffs established their prima facie entitlement to summary judgment on the third cause of action asserted by White Plains Hospital to recover no-fault ****686** benefits on behalf of its assignor, Hafford (*see Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718), by submitting the prescribed statutory billing forms, the affidavit of its biller, the certified mail receipt, and the signed return receipt card referencing the patient and the forms (*see Westchester Med. Ctr. v. Allstate Ins. Co.,* 53 A.D.3d 481, 859 N.Y.S.2d 567; *Westchester Med. Ctr. v. Countrywide Ins. Co.,* 45 A.D.3d 676, 846 N.Y.S.2d 230; *Hospital for Joint Diseases v. New York Cent. Mut. Fire Ins. Co.,* 44 A.D.3d at 904, 844 N.Y.S.2d 371; *New York & Presbyt. Hosp. v. Travelers Prop. Cas. Ins. Co.,* 37 A.D.3d 683, 683–684, 830 N.Y.S.2d 734). Unlike negligence actions where plaintiffs must prove causation, plaintiffs seeking to recover first party no-fault payments bear no such initial burden, as causation is presumed (*see Mount Sinai Hosp. v. Triboro Coach,* 263 A.D.2d at 20, 699 N.Y.S.2d 77; *Bronx Radiology, P.C. v. New York Cent. Mut. Fire Ins. Co.,* 17 Misc.3d 97, 99, 847 N.Y.S.2d 313).

In opposition, Allstate relies upon the judicially-noticed diagnosis and procedure codes key published by HHS to argue, via an attorney's affirmation, that care and treatment rendered to Hafford by White Plains Hospital was causally unrelated to Hafford's automobile accident.

Allstate has failed to come forward with proof in admissible form, as is its burden in opposing summary judgment (*see Friends of Animals v. Associated Fur Mfrs.,* 46 N.Y.2d 1065, 1067, 416 N.Y.S.2d 790, 390 N.E.2d 298; ***22** *Mount Sinai Hosp. v. Triboro Coach,* 263 A.D.2d at 19–20, 699 N.Y.S.2d 77), to raise a triable issue as to " 'the fact or founded belief that the alleged injury does not arise out of an insured incident' " (*Mount Sinai Hosp. v. Triboro Coach,* 263 A.D.2d at 19, 699 N.Y.S.2d 77, quoting *Central Gen. Hosp. v. Chubb Group of Ins. Cos.,* 90 N.Y.2d 195, 199, 659 N.Y.S.2d 246, 681 N.E.2d 413; *see New York & Presbyt. Hosp. v. Selective Ins. Co. of Am.,* 43 A.D.3d 1019, 1020, 842 N.Y.S.2d 63). While the existence of the diagnostic codes and the clinical definitions of Hafford's treated medical conditions may not be in dispute, the question of whether such conditions were wholly unrelated to his automobile accident or not exacerbated by the accident "cannot be resolved without recourse to medical facts" (*Mount Sinai Hosp. v. Triboro Coach,* 263 A.D.2d at 19, 699 N.Y.S.2d 77). Here, Allstate's counsel, in his affirmation, failed to set forth any basis on which to conclude that he was a medical expert qualified to render an opinion on causality (*see Contacare, Inc. v. CIBA–Geigy Corp.,* 49 A.D.3d 1215, 853 N.Y.S.2d 783; *Hofmann v. Toys R Us, N.Y. Ltd. Partnership,* 272 A.D.2d 296, 707 N.Y.S.2d 641). No physician or other medical expert affidavit was included in Allstate's submissions to explain the codes, the diagnoses and, most importantly, the causation or exacerbation, or lack of causation or exacerbation of conditions, in relation to the subject automobile accident. The mere deciphered codes, in and of themselves, are insufficient.

We acknowledge that there are rare but recognized instances where medical issues can be resolved by a trier of fact without resort to expert opinion. A classic example is if a surgeon leaves a foreign object inside a patient's body, the absence of the surgeon's proper exercise of care and skill speaks for itself without the need for an expert (*see Kambat v. St. Francis Hosp.,* 89 N.Y.2d 489, 496, 655 N.Y.S.2d 844, 678 N.E.2d 456). Here, Allstate argues that no medical expert affidavit is required (*see St. Luke's Roosevelt Hosp. v. Allstate Ins. Co.,* 303 A.D.2d 743, 744, 757 N.Y.S.2d 457) as "the codes speak for themselves and ****687** merely require the application of simple logic." We do not agree. The deciphered codes identify Hafford's diagnoses and treatments but do not address causality. Certain of the deciphered codes such as infection, acute respiratory failure, convulsions, and expectoration of blood are not necessarily conditions unrelated to an automobile accident. An expert's affidavit is required for a court to conclude the absence of proximate causality as to these conditions (*see Mount Sinai Hosp. v. Triboro Coach,* 263 A.D.2d at 19, 699 N.Y.S.2d 77) or to at least find a nonspeculative question of

fact as to causality (*see State Farm Mut. Auto. Ins. v. Stack,* 55 A.D.3d 594, 869 N.Y.S.2d 536; *New York & Presbyt. Hosp. v. Selective Ins. Co. of Am.,* 43 A.D.3d at 1020, 842 N.Y.S.2d 63). ***23** The remaining coded conditions, which on their face might appear unrelated to an automobile accident, could conceivably represent exacerbations of pre-existing conditions in the absence of expert medical opinion attesting otherwise. Exacerbations of pre-existing conditions are covered by the No–Fault Law (*see Wolf v. Holyoke Mut. Ins. Co.,* 3 A.D.3d 660, 660–661, 770 N.Y.S.2d 458; *Mount Sinai Hosp. v. Triboro Coach,* 263 A.D.2d at 18, 699 N.Y.S.2d 77).

Allstate's submissions therefore suffer from an inescapable paradox. If the diagnostic codes pertain to conditions unrelated to Hafford's accident, Allstate was required to submit an affidavit from a medical expert (*see Mount Sinai Hosp. v. Triboro Coach,* 263 A.D.2d at 19, 699 N.Y.S.2d 77). If, on the other hand, the diagnostic codes represent conditions related to the accident, then Allstate was required to either pay the no-fault claim, or deny payment on other grounds, within 30 days of receiving the demand (*see* Insurance Law § 5106[a]; 11 NYCRR 65–3.8[a][1]; *Fair Price Med. Supply Corp. v. Travelers Indem. Co.,* 10 N.Y.3d at 563, 860 N.Y.S.2d 471, 890 N.E.2d 233; *Hospital for Joint Diseases v. New York Cent. Mut. Fire Ins. Co.,* 44 A.D.3d at 903, 844 N.Y.S.2d 371; *New York & Presbyt. Hosp. v. Progressive Cas. Ins. Co.,* 5 A.D.3d at 569, 774 N.Y.S.2d 72). Either way, Allstate failed to raise a triable issue of fact in admissible evidentiary form sufficient to warrant denial of summary judgment in favor of White Plains Hospital on the third cause of action.

Based upon the foregoing, we conclude that the Supreme Court properly granted that branch of the plaintiffs' motion which was for summary judgment on the third cause of action asserted by White Plains Hospital.

To the extent that Allstate argues that the branch of its cross motion which was for summary judgment dismissing the third cause of action should have been granted, this contention is not properly before this Court as Allstate's notice of appeal limited the scope of the appeal to that part of the Supreme Court's order which awarded summary judgment to White Plains Hospital on the third cause of action (*see* CPLR 5515[1]; *Spencer v. Crothall Healthcare, Inc.,* 38 A.D.3d 527, 528, 834 N.Y.S.2d 194; *Yannotti v. Four Bros. Homes at Heartland Condominium I,* 24 A.D.3d 659, 660–661, 808 N.Y.S.2d 363).

Accordingly, we affirm the order insofar as appealed from.

ORDERED that the order is affirmed insofar as appealed from, with costs.

FISHER, J.P., MILLER and ENG, JJ., concur.

All Citations

61 A.D.3d 13, 871 N.Y.S.2d 680, 2009 N.Y. Slip Op. 00351

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31 N.Y.3d 111
Court of Appeals of New York.

Lindsay LOHAN, Appellant,
v.
TAKE–TWO INTERACTIVE SOFTWARE, INC., et al., Respondents.

No. 24
|
Decided on March 29, 2018

Synopsis

Background: Celebrity brought action against video game company alleging that avatar in video game was her "look-a-like" and misappropriated her portrait and voice, and asserting statutory claims for invasion of privacy. The Supreme Court, New York County, Joan M. Kenney, J., 2016 WL 1057026, denied company's motion to dismiss. Company appealed. The Supreme Court, Appellate Division, 142 A.D.3d 776, 37 N.Y.S.3d 20, dismissed complaint. Celebrity appealed.

Holdings: The Court of Appeals, Fahey, J., held that:

avatar did not constitute "portrait" of celebrity, within meaning of right to privacy provisions of civil rights law, and

avatar's voice was not celebrity's voice.

Appellate Division's order affirmed.

Attorneys and Law Firms

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Dentons US LLP, New York City (Michael A. Bamberger and Richard M. Zuckerman of counsel), for American Booksellers Association and others, amici curiae.

Hartman & Winnicki, P.C., Ridgewood, New Jersey (Daniel L. Schmutter of counsel), and Eugene Volokh, Scott & Cyan Banister First Amendment Clinic, UCLA School of Law, Los Angeles, California, for Eric M. Freedman and others, amici curiae.

OPINION OF THE COURT

FAHEY, J.

***117 **391 ***782** The primary questions on this appeal are whether an avatar (that is, a graphical representation of a person, in a video game or like media) may constitute a "portrait" within the meaning of Civil Rights Law §§ 50 and 51 and, if so, whether the images in question in the video game central to this matter are recognizable as plaintiff. We conclude a computer generated image may constitute a portrait within the meaning of that law. We also conclude, however, that the subject images are not recognizable as plaintiff, and that the amended complaint, which contains four causes of action for violation of privacy pursuant to Civil Rights Law §§ 50 and 51, was properly dismissed.

Facts[1]

Defendants develop, sell, market, and distribute video games, including the commercially successful "Grand Theft Auto V" (GTAV) game. GTAV is an action-adventure game that is set in a fictional state called "San Andreas" that, according to the vice president for quality assurance of defendant Rockstar Games, Inc. (Rockstar), is intended to evoke Southern California. GTAV's plot occurs in and around a fictional city called "Los Santos," which in turn is intended to evoke Los Angeles. In addition to a 50–hour principal storyline, GTAV contains approximately 100 hours of supplementary game play containing "random events" that a player may choose to explore as he or she proceeds through the game's main plot.

One of those random events is relevant to this appeal. In what defendants characterize as the "Escape Paparazzi" scene in GTAV, the player encounters a character named "Lacey Jonas" hiding from paparazzi in an alley. To the extent the player chooses to help her escape those photographers, Jonas enters the player's automobile before describing herself as an "actress slash singer" and the "voice of a generation." Jonas also characterizes herself as "really famous," and the player's character recognizes "that Jonas has ****392 ***783** starred in romantic comedies and a cheerleader dance-off movie."

***118** Before the GTAV storyline may proceed to any random events, including the "Escape Paparazzi" scene, the player must view what defendants refer to as "transition screens," which "contain artwork that appears briefly on the user's screen while the game content [loads] into the game console's memory." Two "screens" from GTAV are relevant to this appeal. One such screen contains an image (the "Stop and Frisk" image) of a blonde woman who is clad in denim shorts, a fedora, necklaces, large sunglasses, and a white T-shirt while being frisked by a female police officer. The second such screen contains an image (the "Beach Weather" image) wherein the same blonde woman is depicted wearing a red bikini and bracelets, taking a "selfie" with her cell phone, and displaying the peace sign with one of her hands.

Defendants purportedly released GTAV for the PlayStation and Xbox 360 video game consoles on or about September 17, 2013. Through that release, copies of GTAV were distributed to and sold by numerous domestic and foreign retailers, including retailers within New York State. To advertise the game prior to its release, defendants allegedly used the "Stop and Frisk" and "Beach Weather" images on various promotional materials, including billboards. Defendants also used the "Beach Weather" image on the packaging for the GTAV, and both the "Beach Weather" and "Stop and Frisk" images on video game discs.

According to plaintiff, who describes herself as a figure "recognized in social media" and as "a celebrity actor... who has been regularly depicted in television, tabloids, blogs, movies, fashion related magazines, talk shows, and theatre for the past 15 ... years," the Jonas character is her "look-a-like" and misappropriates her "portrait[ ] and voice." Plaintiff also believes

that the "Stop and Frisk" and "Beach Weather" images each cumulatively evoke her "images, portrait[,] and persona."

Inasmuch as she did not provide written consent for the use of what she characterizes as her portrait and her voice in GTAV, plaintiff commenced this action seeking, among other things, compensatory and punitive damages for invasion of privacy in violation of Civil Rights Law §§ 50 and 51. In lieu of answering, defendants moved to dismiss the amended complaint for failure to state a cause of action (*see* CPLR 3211[a][7]) and based on, among other things, documentary evidence (*see* CPLR 3211[a][1]). Supreme Court denied the part of the motion seeking dismissal of the amended complaint (2016 N.Y. Slip Op. 32866[U], 2016 WL 1057026 [2016]) but, on appeal, the Appellate Division modified ***119** that order and granted that application to the extent it sought dismissal of the operative pleading (142 A.D.3d 776, 777, 37 N.Y.S.3d 20 [1st Dept. 2016]). We subsequently granted plaintiff leave to appeal to this Court (28 N.Y.3d 915, 2017 WL 628691, 2017 WL 628761 [2017]), and we now affirm the Appellate Division order insofar as appealed from.

The Statutory Right of Privacy

"Historically, New York common law did not recognize a cause of action for invasion of privacy" (*Shields v. Gross,* 58 N.Y.2d 338, 344, 461 N.Y.S.2d 254, 448 N.E.2d 108 [1983]). That point was articulated in *Roberson v. Rochester Folding Box Co.,* 171 N.Y. 538, 64 N.E. 442, 64 N.E. 442 (1902), which arose from the unauthorized use of approximately 25,000 reproductions of a photograph of the infant plaintiff to promote the defendant's flour (*see id.* at 542, 64 N.E. 442). In dismissing the complaint in that matter, which sounded in the breach of a "so-called right of privacy" (*****784 **393** *id.* at 544, 64 N.E. 442), we "broadly denied the existence of such a cause of action under New York common law" (*Arrington v. New York Times Co.,* 55 N.Y.2d 433, 439, 449 N.Y.S.2d 941, 434 N.E.2d 1319 [1982]; *see Roberson,* 171 N.Y. at 556, 64 N.E. 442).

In response to *Roberson* ,171 N.Y. 538, 64 N.E. 442, the legislature codified "a limited statutory right of privacy" in article 5 of the Civil Rights Law (*Messenger v. Gruner + Jahr Print. & Publ.,* 94 N.Y.2d 436, 441, 706 N.Y.S.2d 52, 727 N.E.2d 549 [2000], *resolved issue certified* 208 F.3d 122 [2d Cir. 2000], *cert denied* 531 U.S. 818, 121 S.Ct. 57, 148 L.Ed.2d 25 [2000]). Civil Rights Law § 50 "makes it a misdemeanor to use a living person's 'name, portrait or picture' for advertising or trade purposes 'without having first obtained the written consent of such person, or if a minor of his or her parent or guardian' " (*Messenger,* 94 N.Y.2d at 441, 706 N.Y.S.2d 52, 727 N.E.2d 549, quoting Civil Rights Law § 50). Civil Rights Law § 51, as amended in 1921 (L 1921, ch 501, § 1), "adds the civil damages teeth" (*Messenger,* 94 N.Y.2d at 449, 706 N.Y.S.2d 52, 727 N.E.2d 549 [Bellacosa, J., dissenting]) and "makes a violation of section 50 actionable in a civil suit" (*Arrington,* 55 N.Y.2d at 438 n 1, 449 N.Y.S.2d 941, 434 N.E.2d 1319). As relevant here, Civil Rights Law § 51 specifically provides that

> "[a]ny person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as...provided [in Civil Rights Law § 50] may maintain an equitable action ... to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use...."

***120** In point of fact, Civil Rights Law §§ 50 and 51 "were drafted narrowly to encompass only the commercial use of an individual's name or likeness and no more" (*Arrington,* 55 N.Y.2d at 439, 449 N.Y.S.2d 941, 434 N.E.2d 1319). Based on that slender legislative intent, courts determining questions of the application of Civil Rights Law § 51 have limited the remedial use of that statute. By way of example, we have deemed non-commercial—and therefore non-actionable—the use of a person's likeness with respect to "newsworthy events or matters of public interest" (*Howell v. New York Post Co.,* 81 N.Y.2d 115, 123, 596 N.Y.S.2d 350, 612 N.E.2d 699 [1993]; *see Finger v. Omni Publs. Intl.,* 77 N.Y.2d 138, 141–142, 564 N.Y.S.2d 1014, 566 N.E.2d 141 [1990]; *Stephano v. News Group Publs.,* 64 N.Y.2d 174, 184, 485 N.Y.S.2d 220, 474 N.E.2d 580 [1984]), and other courts have explicitly concluded that works of humor (*see Onassis v. Christian Dior–New York, Inc.,* 122 Misc.2d 603, 614, 472 N.Y.S.2d 254 [Sup. C.t, New York County 1984], *affd* 110 A.D.2d 1095, 488 N.Y.S.2d 943 [1st Dept. 1985]), art (*see Altbach v. Kulon,* 302 A.D.2d 655, 658, 754 N.Y.S.2d 709 [3d Dept. 2003]), fiction, and satire (*see Hampton v. Guare,* 195 A.D.2d 366, 366, 600 N.Y.S.2d 57 [1st Dept. 1993], *lv denied* 82 N.Y.2d 659, 605 N.Y.S.2d 5, 625 N.E.2d 590 [1993]; *see also University of Notre Dame Du Lac v. Twentieth Century–Fox Film Corp.,* 22 A.D.2d 452, 256 N.Y.S.2d 301 [1st Dept. 1965], *affd on op below* 15 N.Y.2d 940, 259 N.Y.S.2d 832, 207 N.E.2d 508 [1965]) do not come within the ambit of section 51 (*see generally Messenger,* 94 N.Y.2d at 446, 706 N.Y.S.2d 52, 727 N.E.2d 549). Indeed, at

bottom, courts have cabined section 51 " 'to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest' guaranteed by the First Amendment" (*Ann–Margret v. High Soc. Magazine, Inc.,* 498 F.Supp. 401, 404 [S.D. N.Y.1980], quoting ***785 **394** *Time, Inc. v. Hill,* 385 U.S. 374, 382, 87 S.Ct. 534, 17 L.Ed.2d 456 [1967]; *see Howell,* 81 N.Y.2d at 123, 596 N.Y.S.2d 350, 612 N.E.2d 699) because "freedom of speech and the press ... transcends the right to privacy" (*Namath v. Sports Illustrated,* 80 Misc.2d 531, 535, 363 N.Y.S.2d 276 [Sup. Ct., New York County 1975], *affd* 48 A.D.2d 487, 371 N.Y.S.2d 10 [1st Dept. 1975], *affd* 39 N.Y.2d 897, 386 N.Y.S.2d 397, 352 N.E.2d 584 [1976]).

Analysis

Turning to the merits, based on the language of the statute, "[t]o prevail on a ... right to privacy claim pursuant to [Civil Rights Law § 51], a plaintiff must prove: (1) use of plaintiff's name, portrait, picture or voice (2) for advertising purposes or for the purposes of trade (3) without consent and (4) within the state of New York" (*Lohan v. Perez,* 924 F.Supp.2d 447, 454 [E.D. N.Y.2013] [internal quotation marks omitted]). Our review turns on the "portrait" element of that statute and, as an initial matter, we conclude that an avatar (that is, a graphical representation of a person, in a video game or like media) may constitute ***121** a "portrait" within the meaning of article 5 of the Civil Rights Law.

The affirmative answer to that "avatar" inquiry requires us to proceed to the issue whether the images in question in GTAV are recognizable as plaintiff. Applying the settled rules applicable to this motion to dismiss (*see Leon v. Martinez,* 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]), we conclude that the amended complaint was properly dismissed because the artistic renderings are indistinct, satirical representations of the style, look, and persona of a modern, beach-going young woman that are not reasonably identifiable as plaintiff (*see Cohen v. Herbal Concepts,* 63 N.Y.2d 379, 384, 482 N.Y.S.2d 457, 472 N.E.2d 307 [1984]). We address each of those controversies separately for ease of review.

The Avatar Question

To be sure, " '[t]he language of a statute is generally construed according to its natural and most obvious sense ... in accordance with its ordinary and accepted meaning, unless the Legislature by definition or from the rest of the context of the statute provides a special meaning' " (*Samiento v. World Yacht Inc.,* 10 N.Y.3d 70, 77–78, 854 N.Y.S.2d 83, 883 N.E.2d 990 [2008], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 94, at 191–194 [1971 ed]). Civil Rights Law § 51 was enacted in 1903 (see L 1903, ch 132, § 2), at which time digital technology was uninvented. To that end, a reasonable mind could question how the term "portrait," as incorporated in the original and present forms of Civil Rights Law § 51, could embrace the imagery in question.

The appropriate course, however, is to employ the theory of statutory construction that general terms encompass future developments and technological advancements. In the context of statutory construction, this Court has observed that "general legislative enactments are mindful of the growth and increasing needs of society, and they should be construed to encourage, rather than to embarrass[,] the inventive and progressive tendency of the people" (*Hudson Riv. Tel. Co. v. Watervliet Turnpike & R. Co.,* 135 N.Y. 393, 403–404, 32 N.E. 148 [1892]; *see* McKinney's Cons Laws of NY, Book 1, Statutes, § 93 ["statutes framed in general terms ordinarily apply to cases and subjects within their terms subsequently arising"]).

Operating under that standard, we conclude that an avatar may constitute a "portrait" within the meaning of Civil Rights Law article 5. We have held that the term "portrait" embraces both photographic and artistic reproductions of a ****395 *122** person's ***786** likeness (*see Cohen,* 63 N.Y.2d at 384, 482 N.Y.S.2d 457, 472 N.E.2d 307; *see also Binns v. Vitagraph Co. of Am.,* 210 N.Y. 51, 57, 103 N.E. 1108 [1913] ["A picture within the meaning of (Civil Rights Law article 5) is not necessarily a photograph of the living person, but includes any representation of such person"]; *see generally Young v. Greneker Studios,* 175 Misc. 1027, 1028, 26 N.Y.S.2d 357 [Sup. Ct., New York County 1941] ["The words 'picture' and 'portrait' are broad enough to include any representation, whether by photograph, painting or sculpture"]). Federal courts share the view that "any recognizable likeness, not just an actual photograph, may qualify as a 'portrait or picture' " (*Burck v.*

Mars, Inc., 571 F.Supp.2d 446, 451 [S.D. N.Y.2008], quoting *Allen v. National Video, Inc.,* 610 F.Supp. 612, 622 [S.D. N.Y.1985]), having ruled that a composite photograph and drawing (*Ali v. Playgirl, Inc.,* 447 F.Supp. 723, 726 [S.D. N.Y.1978]) and a cartoon (*Allen,* 610 F.Supp. at 622) may trigger the protections of Civil Rights Law article 5. In view of the proliferation of information technology and digital communication, we conclude that a graphical representation in a video game or like media may constitute a "portrait" within the meaning of the Civil Rights Law.

The Portrait Question

Even applying the deferential rules germane to a motion to dismiss, we nevertheless conclude that the images in question do not constitute a "portrait" of plaintiff, and that the amended complaint therefore was properly dismissed (*see generally Leon,* 84 N.Y.2d at 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511).

"Manifestly, there can be no appropriation of [a] plaintiff's [likeness] for commercial purposes if he or she is not recognizable from the [image in question]" (*Cohen,* 63 N.Y.2d at 384, 482 N.Y.S.2d 457, 472 N.E.2d 307). It follows that "a privacy action [cannot] be sustained ... because of the nonconsensual use of a [representation] without identifying features" (*id.*). Whether an image or avatar is a "portrait" because it presents a "recognizable likeness" typically is question for a trier of fact (*id.*). Nevertheless, before a factfinder can decide that question, there must be a basis for it to conclude that the person depicted "is capable of being identified from the advertisement alone" as plaintiff (*id.*). That legal determination will depend on the court's evaluation of the "quality and quantity of the identifiable characteristics" present in the purported portrait (*id.*).

Here, the Jonas character simply is not recognizable as plaintiff inasmuch as it merely is a generic artistic depiction ***123** of a "twenty something" woman without any particular identifying physical characteristics. The analysis with respect to the Beach Weather and Stop and Frisk illustrations is the same. Those artistic renderings are indistinct, satirical representations of the style, look, and persona of a modern, beach-going young woman. It is undisputed that defendants did not refer to plaintiff in GTAV, did not use her name in GTAV, and did not use a photograph of her in that game (*see* 142 AD3d at 776–777, 37 N.Y.S.3d 20, citing *Costanza v. Seinfeld,* 279 A.D.2d 255, 255, 719 N.Y.S.2d 29 [1st Dept. 2001]). Moreover, the ambiguous representations in question are nothing more than cultural comment that is not recognizable as plaintiff and therefore is not actionable under Civil Rights Law article 5 (*see generally Cohen,* 63 N.Y.2d at 384, 482 N.Y.S.2d 457, 472 N.E.2d 307).[2]

****396 ***787** In view of our determination, we do not address plaintiff's remaining contention with respect to the "advertising" and "trade" elements of Civil Rights Law § 51. We also do not address the alternative contention of defendant Rockstar North in support of dismissal of the amended complaint as against it.

Accordingly, the order of the Appellate Division, insofar as appealed from, should be affirmed, with costs.

Order, insofar as appealed from, affirmed, with costs.

Chief Judge DiFiore and Judges Rivera, Stein, Garcia and Feinman concur. Judge Wilson took no part.

All Citations

31 N.Y.3d 111, 97 N.E.3d 389, 73 N.Y.S.3d 780, 2018 N.Y. Slip Op. 02208

Footnotes

1 Inasmuch as this appeal arises from defendants' motion to dismiss the amended complaint, we must, among other things, "accept as true the facts alleged in the [amended] complaint and any submissions in opposition to the dismissal [application]" (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 151–152, 746 N.Y.S.2d 131, 773 N.E.2d 496 [2002]).

[2] As noted, plaintiff also alleges in the amended complaint that, through the dialogue of GTAV's Jonas character, defendants have misappropriated her voice. Defendants submitted an affidavit asserting that her voice was not used in GTAV. In response, plaintiff did not dispute this fact but, rather, claimed that GTAV incorporated her "voice resemblance and accent." Before this Court, plaintiff again implicitly concedes that GTAV did not use her "voice." Accordingly, the amended complaint was also properly dismissed with respect to that claim.

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12 A.D.3d 194
Supreme Court, Appellate Division, First Department, New York.

Daniel NAPOLITANO, Plaintiff–Appellant,
v.
The CITY OF NEW YORK, et al., Defendants–Respondents,
Patrick Kelleher, et al., Defendants.

Nov. 9, 2004.

Synopsis
Background: Former police officer brought § 1983 action against police department alleging department coerced him into entering plea of guilty to disciplinary charges. The Supreme Court, New York County, Faviola A. Soto, J., granted defendants' motion to dismiss for failure to state a claim.

Holding: The Supreme Court, Appellate Division, held that officer was barred from bringing action against police department.

Affirmed.

Attorneys and Law Firms

****584** Wolin & Wolin, Esqs., Jericho (Alan Wolin of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (John Hogrogian of counsel), for respondents.

TOM, J.P., ANDRIAS, SULLIVAN, ELLERIN, SWEENY, JJ.

Opinion

***194** Judgment, Supreme Court, New York County (Faviola A. Soto, J.), entered July 31, 2003, dismissing the complaint, and bringing up for review an order, same court and Justice, entered May 13, 2003, which, in an action under 42 USC § 1983 alleging defendant Police Department's coercion of plaintiff's plea of guilty to disciplinary charges, granted defendants-respondents' motion ***195** to dismiss the complaint for failure to state a cause of action, unanimously affirmed, without costs. Appeal from the aforesaid order unanimouslydismissed, ****585** without costs, as subsumed in the appeal from the judgment.

Plaintiff settled the disciplinary charges pending against him, pleading guilty thereto and giving defendants-respondents a general release, and taking in exchange a vested interest retirement. Having accepted the benefits of the settlement, plaintiff ratified the release, and is therefore barred from alleging duress in its execution (*see Fruchthandler v. Green,* 233 A.D.2d 214, 215, 649 N.Y.S.2d 694 [1996]; *Liberty Marble v. Elite Stone Setting Corp.,* 248 A.D.2d 302, 304, 670 N.Y.S.2d 836 [1998]). That almost two years passed between the alleged duress, i.e., a threat of demotion if plaintiff contested the disciplinary charges, and the filing of the instant complaint further undermining the claim of duress (*see Fruchthandler,* 233 A.D.2d at 215, 649 N.Y.S.2d 694; *Nasik Breeding & Research Farm v. Merck & Co.,* 165 F.Supp.2d 514, 527–528 [S.D.N.Y. 2001]).

783 N.Y.S.2d 584, 2004 N.Y. Slip Op. 07969

All Citations

12 A.D.3d 194, 783 N.Y.S.2d 584, 2004 N.Y. Slip Op. 07969

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26 N.Y.3d 358
Court of Appeals of New York.

The PEOPLE of the State of New York, Respondent,
v.
Ally GOLO, Appellant.

Nov. 23, 2015.

Synopsis

Background: Days after defendant pleaded guilty to third-degree criminal possession of a controlled substance, he pleaded guilty to two counts each of first-degree robbery and endangering the welfare of a child. Although he was subsequently paroled, his parole was revoked on two occasions following various other arrests, and he was sentenced to a parole hold. Thereafter he moved, pursuant to the Drug Law Reform Act of 2009 (DLRA), to be resentenced on the drug conviction. The Supreme Court, Queens County, Ira H. Margulis, J., 109 A.D.3d 623, 970 N.Y.S. 2d 604, denied the motion. The Supreme Court, Appellate Division, 109 A.D.3d 623, 970 N.Y.S.2d 604, affirmed. Defendant appealed.

The Court of Appeals, Abdus–Salaam, J., held that failure to grant defendant an opportunity to be heard on his DLRA motion to be resentenced was error.

Reversed and remitted for further proceedings.

Attorneys and Law Firms

***110** Lynn W.L. Fahey, Appellate Advocates, New York City (David P. Greenberg of counsel), for appellant.

***111** Richard A. Brown, District Attorney, Kew Gardens (Danielle S. Fenn and John M. Castellano of counsel), for respondent.

OPINION OF THE COURT

ABDUS–SALAAM, J.

***360 **186** In April 2004, defendant pleaded guilty to criminal sale of a controlled substance in the third degree, a class B felony, and he was sentenced in June 2004 to an indeterminate prison term of from 3 ⅓ to 10 years. Defendant had committed that crime in April 2003. Days after he was sentenced on this drug charge, defendant was sentenced, upon his guilty plea to two counts each of robbery in the first degree and of endangering the welfare of a child, in connection with robberies that had occurred in May and June 2003. For these crimes, he was sentenced to two determinate seven-year prison terms for the robbery counts to be served concurrently with each other and two one-year terms for the endangering counts.

Defendant was initially released to parole supervision in September 2009. However, his parole was revoked following his May 2010 arrest for possessing a gravity knife, and he was referred to a drug treatment program. After completing the drug treatment program, he was restored to parole supervision in November 2010. But less than three months later defendant was arrested for possessing cocaine and resisting arrest, and his parole was again revoked in September 2011. He pleaded guilty to a parole violation for resisting arrest and was sentenced to an 18–month parole hold.

In March 2012, defendant moved, pursuant to the Drug Law Reform Act of 2009 (L. 2009, ch. 56 [codified in relevant part at CPL 440.46] [hereinafter DLRA–3]), to be resentenced on his 2004 conviction for criminal sale of a controlled substance in the third degree. Supreme Court denied the motion for resentencing, holding that defendant was ineligible because he had been convicted of an "exclusion offense" (CPL 440.46[5][a]) within the 10–year period between his sentencing on his 2004 conviction for criminal sale of a controlled substance in the third degree and his application for resentencing. The court issued its decision without the parties being present, and ***361** without offering defendant an opportunity to appear. The court found that it need not consider defendant's interest of justice arguments for resentencing, but that even if defendant were eligible for resentencing, the court would still deny his motion in the exercise of its discretion.

The Appellate Division affirmed (109 A.D.3d 623, 970 N.Y.S.2d 604 [2d Dept.2013]). It disagreed with Supreme Court about defendant's eligibility to be resentenced, reasoning that defendant's robbery convictions did not constitute "exclusion offense[s]" within the meaning of CPL 440.46(5)(a) because they were committed after the drug offense for which he sought resentencing. However, it held that Supreme Court providently exercised its discretion in concluding that considerations of substantial justice dictated the denial of the motion. A Judge of this Court granted leave to appeal (23 N.Y.3d 1037, 993 N.Y.S.2d 250, 17 N.E.3d 505 [2014]), and we now reverse and remit.

As an initial matter, the People argue that Supreme Court properly found that defendant was ineligible for resentencing. We are able to review that argument notwithstanding defendant's assertion to the contrary (*see* CPL 470.35[1]), and agree with the Appellate Division that the 2004 robbery convictions are not "exclusion offense[s]" under CPL 440.46(5)(a) because defendant's convictions on the robbery charges occurred after, not prior ****187 ***112** to, the drug offense for which he seeks resentencing. An " exclusion offense" is defined as

> "a crime for which the person was *previously convicted* within the preceding ten years, excluding any time during which the offender was incarcerated for any reason between the time of commission of the *previous felony* and the time of commission of the *present felony,* which was: (i) a violent felony offense as defined in section 70.02 of the penal law; or (ii) any other offense for which a merit time allowance is not available pursuant to [Correction Law § 803(1)(d)(ii)]" (CPL 440.46[5][a] [emphasis added]).

"As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (*Majewski v. Broadalbin–Perth Cent. School Dist.,* 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 696 N.E.2d 978 [1998]). Given the provision's references to a "previous" felony and the "present" felony, the wording of the ***362** statute indicates that exclusion offenses must have been committed before the drug offense for which resentencing is sought (*see People v. Myles,* 90 A.D.3d 952, 953, 935 N.Y.S.2d 99 [2d Dept.2011] ["The statutory language was not written in anticipation of a situation where the potential exclusion offense was committed after the drug conviction for which the defendant seeks resentencing"]). Our decision in *People v. Sosa,* 18 N.Y.3d 436, 940 N.Y.S.2d 534, 963 N.E.2d 1235 (2012) is not to the contrary, as it concerned the interpretation of the phrase "within the preceding ten years," not the meaning of the term "previously convicted."

Although we recognize the seeming anomaly that a violent felony committed days after the drug offense cannot count as an exclusion offense, while the same violent felony committed prior to the drug offense could be an exclusion offense, "it ... remain[s] that the law, as it is written, countenances the disparity and is not properly rewritten to accord more perfectly with judicial or prosecutorial notions of consistency" (*People v. Sosa,* 18 N.Y.3d at 442, 940 N.Y.S.2d 534, 963 N.E.2d 1235). Here, as in *People v. Paulin,* where we addressed a different provision of the DLRA–3, we are guided "[b]y the plain text of the statute" (17 N.Y.3d 238, 244, 929 N.Y.S.2d 36, 952 N.E.2d 1028 [2011]). If the wording of the statute has caused an unintended consequence, it is up to the legislature to correct it.

Furthermore, as we noted in *Paulin*, if defendants have shown by their conduct that they do not deserve relief from their sentences, courts can deny their resentencing applications. "A provision of the 2004 DLRA, incorporated by reference into the 2009 DLRA (CPL 440.46[3]), says that a resentencing application need not be granted if 'substantial justice dictates that the application should be denied' (L. 2004, ch. 738, § 23)" (*id.* at 244, 929 N.Y.S.2d 36, 952 N.E.2d 1028). Thus, while

defendant's conduct after his conviction for the drug offense cannot constitute an "exclusion offense," it is properly considered by the court in deciding his resentencing application.

We agree with defendant that it was error for the courts below to decide his resentencing motion without giving him an opportunity to be heard. The DLRA–3 states that on a defendant's application for resentencing, "[t]he court shall offer an opportunity for a hearing and bring the applicant before it" (L. 2004, ch. 738, § 23; CPL 440.46[3]). This language is mandatory. The statute also provides that "[t]he court may also conduct a hearing, if necessary, to determine whether such person **188 ***113 qualifies to be resentenced or to determine any controverted issue of fact relevant to the issue of sentencing" *363 (*id.*). Thus, the permissive language authorizing a hearing on the issues of eligibility and sentencing contrasts with the unambiguous directive that the court offer a defendant an opportunity to be heard on the merits of the application. There should be a new determination of the defendant's motion, to be made after affording him an opportunity to appear before the court (*People v. Bens,* 109 A.D.3d 664, 665, 972 N.Y.S.2d 576 [2d Dept. 2013]).

Accordingly, the order of the Appellate Division should be reversed, and the case remitted to Supreme Court for further proceedings in accordance with this opinion.

Chief Judge LIPPMAN and Judges PIGOTT, RIVERA, STEIN and FAHEY concur.

Order reversed and case remitted to Supreme Court, Queens County, for further proceedings in accordance with the opinion herein.

All Citations

26 N.Y.3d 358, 44 N.E.3d 185, 23 N.Y.S.3d 110, 2015 N.Y. Slip Op. 08611

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95 N.Y.2d 455
Court of Appeals of New York.

Betty A. RILEY et al., Appellants,
v.
COUNTY OF BROOME et al., Respondents.
John P. Wilson, Appellant,
v.
State of New York, Respondent.

Nov. 21, 2000.

Synopsis
Motorist sued county for injuries sustained in collision with street sweeper. Following jury trial, the Supreme Court, Broome County, Patrick D. Monserrate, J., entered judgment for county. Motorist appealed. The Supreme Court, Appellate Division, Third Judicial Department, Anthony J. Carpinello, affirmed. Motorist appealed. Second motorist sued State of New York for injuries sustained in collision with snowplow. At close of evidence during trial, the Court of Claims, Thomas J. McNamara, J., dismissed claim. The Supreme Court, Appellate Division, Fourth Judicial Department, affirmed. Second motorist appealed. The Court of Appeals, Kaye, C.J., held that: (1) all vehicles actually engaged in work on a highway are exempt from the rules of the road, abrogating *Somersall v. New York Tel. Co.*; (2) street sweeper and snowplow were actually engaged in work on a highway; and (3) recklessness is the standard of care imposed on vehicles actually engaged in work on a highway.

Affirmed.

Attorneys and Law Firms

*****624 *457 **99** Thomas F. Cannavino, Endicott, for appellants in the first above-entitled action.

***458** William L. Gibson, Jr., County Attorney of Broome County, Binghamton (Robert G. Behnke of counsel), for respondents in the first above-entitled action.

Lockwood & Golden, Utica (Lawrence W. Golden and B. Brooks Benson of counsel), for appellant in the second above-entitled action.

Eliot Spitzer, Attorney General, Albany (Robert M. Goldfarb, Preeta D. Bansal, Daniel Smirlock and Peter G. Crary of counsel), for respondent in the second above-entitled action.

***459 OPINION OF THE COURT**

Chief Judge KAYE.

These appeals call upon us to do what increasingly is asked of courts in this age of statutes: interpret the words of a legislative enactment which the contesting parties construe differently. In particular, we are asked whether Vehicle and Traffic Law § 1103(b) exempts statutorily defined "hazard vehicles" engaged in highway work from the "rules of the road," and whether it limits the liability of their owners and operators to reckless disregard for the safety of others. We conclude that defendants correctly read the statute, and we hold—as did the courts before us—that the vehicles here were exempt from the rules of the road and their liability limited to reckless conduct.

Riley v. County of Broome

Defendant Garwood A. Young, an employee of the Broome County Highway Division, was operating a street sweeper on West Colesville Road in the Town of Kirkwood. Young was driving two or three miles per hour, with the sweeper straddling the shoulder and the road. Plaintiff Betty Riley was also driving on West Colesville Road, in the same direction as the street sweeper. As Riley reached the top of a hill, she saw a "huge patch of fog"—actually a cloud of dirt and dust created by the sweeper—and collided with the sweeper.

Riley and her husband brought this action against Young and the County, alleging that the sweeper caused the accident. ***460** At trial, the court held—over Riley's objection—that, under Vehicle and Traffic Law § 1103(b), the applicable standard of care was whether defendants conducted themselves "in such a way so as not to *****625 **100** recklessly disregard the safety of others." The court then charged the jury on that standard. The jury returned a verdict in favor of defendants, finding no recklessness in the operation of the sweeper. In a comprehensive opinion by Justice Anthony J. Carpinello, the Appellate Division affirmed, holding that under Vehicle and Traffic Law § 1103(b), all vehicles engaged in "highway maintenance" are exempt from the rules of the road and subject only to a recklessness standard (263 A.D.2d 267, 273, 700 N.Y.S.2d 573).

Wilson v. State of New York

Claimant John Wilson was driving west from Canajoharie to Utica on Route 5, traveling at 30 to 35 miles per hour. Moderate to heavy snow was falling, rendering visibility poor. Two snowplows owned by the State were operating near the intersection of Route 5 and Route 167, one behind the other in the eastbound passing lane on Route 5. As Wilson approached the intersection, the first snowplow stopped to make a wide turn, and the second snowplow—driven by William Hunt—made a left turn inside the first plow in an attempt to enter Route 167 North. Although Hunt looked, he did not see Wilson's car approaching, and his snowplow collided with Wilson's car.

Wilson then brought the present action against the State of New York. The case proceeded to trial before the Court of Claims. At the close of the evidence, the State moved to dismiss, arguing that Wilson had failed to establish that the accident was the result of recklessness. The court granted the motion, holding that a recklessness standard applied because the snowplow was involved in work on a highway within the meaning of Vehicle and Traffic Law § 1103(b), and that the evidence was insufficient to meet that standard. The Appellate Division affirmed, holding that since the snowplow qualified as a vehicle "actually engaged in work on a highway" under section 1103(b), the recklessness standard applied, and the evidence failed to establish that Hunt had acted recklessly (269 A.D.2d 854, 703 N.Y.S.2d 848).

The "Hazard Vehicle" Exemption

On appeal to this Court, Riley and Wilson (claimants) contend that Vehicle and Traffic Law § 1103(b) does not ***461**

exempt "hazard vehicles"—like snowplows and street sweepers—from the rules of the road.[1] Rather, they assert that section 1103(b) exempts such vehicles only from the stopping, standing and parking regulations of Vehicle and Traffic Law § 1202(a). We agree with the trial courts and the Appellate Division that section 1103(b) exempts all vehicles "actually engaged in work on a highway"—including the vehicles here—from the rules of the road.

Some degree of risk, of course, is inherent in travel on public highways. Certain classes of vehicles—like snowplows and street sweepers—are intended to minimize the risk by keeping the roadways clean and safe for everyone. While serving an important public function, however, those vehicles may themselves cause risks to ordinary motorists with whom they share the road. Over the years, courts and legislatures have struggled to define the rules under which these vehicles may operate and the standard of care they owe to others.

*****626 **101** At common law, all vehicles, including emergency vehicles, were held to an ordinary negligence standard (*see, e.g., Farley v. Mayor of City of N.Y.,* 152 N.Y. 222, 227–228, 46 N.E. 506 [1897]; *Garrett v. City of Schenectady,* 268 N.Y. 219, 223–224, 197 N.E. 257 [1935]; *Ottmann v. Village of Rockville Centre,* 275 N.Y. 270, 273, 9 N.E.2d 862 [1937]).[2] But the common law also recognized that the level of care owed by emergency and road work vehicles must be tempered by the nature of their work. Fire trucks, for instance, were permitted to drive at the "greatest practicable speed," since the "safety of property and the protection of life may * * * depend upon celerity of movement" (*Farley v. Mayor of City of N. Y., supra,* at 227, 46 N.E. 506). In addition, many emergency vehicles were, by statute, given the right of way (*see, id.*). Nevertheless, the common law required that such vehicles exercise their right of way ***462** "with care and caution * * * measured by the purpose and necessity of the right" (*Hashey v. Board of Fire Commrs. of Roosevelt Fire Dist.,* 192 N.Y.S.2d 767, 769–770 [Sup.Ct., Nassau County]).

In 1957, the Legislature enacted what is now title VII of the Vehicle and Traffic Law (§ 1100 *et seq.*), creating a uniform set of traffic regulations, or the "rules of the road" (*see,* L. 1957, ch. 698). That legislation was intended to update and replace the former traffic regulations, and bring them into conformance with the Uniform Vehicle Code adopted in other states (*see,* Mem. in Support, Bill Jacket, L. 1957, ch. 698, at 35–37).

The Vehicle and Traffic Law states that the rules of the road apply to all vehicles unless otherwise provided by law (*see,* Vehicle and Traffic Law §§ 1101, 1103[a]). Except for the provisions regarding driving under the influence of drugs or alcohol, however, the rules of the road explicitly do *not* apply to "persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway" (Vehicle and Traffic Law § 1103[b]).[3] Section 1103(b) adds that Vehicle and Traffic Law § 1202(a), which regulates stopping, standing and parking, does not apply to "hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway but shall apply to such persons and vehicles when traveling to or from such hazardous operation." Similarly, Vehicle and Traffic Law § 1104 exempts "emergency vehicles," such as ambulances, police vehicles and fire vehicles (*see,* Vehicle and Traffic Law § 101), engaged in emergency operations from the rules of the road, subject to specified conditions.

The language of these statutes seems clear: all vehicles "actually engaged in work on a highway"—just as all emergency vehicles engaged in emergency operations—are exempt from ***463** the rules of the road. In the cases at hand, the street sweeper and the snowplow were engaged in "work on a highway." The street sweeper was cleaning the street; the *****627 **102** snowplow was clearing the road during a snowstorm. Thus, the Appellate Division correctly held that section 1103(b) exempts both vehicles from the rules of the road.

We reject claimants' contention that designated "hazard vehicles" are exempt *only* from the stopping, standing and parking regulations of section 1202(a), even when they are engaged in work on a highway. Section 1103(b) says no such thing. Rather, by its plain language, section 1103(b) excuses all vehicles "actually engaged in work on a highway" from the rules of the road, regardless of their classification. To be sure, the statute also gives protection to designated "hazard vehicles" engaged in "hazardous operation" (as defined by sections 117–a and 117–b), excusing them from the stopping, standing and parking rules of section 1202(a). But the statute nowhere states that "hazard vehicles" are a distinct class from "work vehicles," nor does it deny "hazard vehicles" the special protection given to all vehicles actually engaged in road work.[4]

The legislative history of section 1103(b) confirms this plain language reading.

We note at the outset that it is appropriate to examine the legislative history even though the language of section 1103(b) is

clear. The primary consideration of courts in interpreting a statute is to "ascertain and give effect to the intention of the Legislature" (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 92[a], at 177). Of course, the words of the statute are the best evidence of the Legislature's intent. As a general rule, unambiguous language of a statute is alone determinative (*see, Matter of Washington Post Co. v. New York State Ins. Dept.,* 61 N.Y.2d 557, 565, 475 N.Y.S.2d 263, 463 N.E.2d 604). Nevertheless, the legislative history of an enactment may also be relevant and "is not to be ignored, even if words be clear" (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 124, at 252). " 'When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination" ***464** ' " (*New York State Bankers Assn. v. Albright,* 38 N.Y.2d 430, 437, 381 N.Y.S.2d 17, 343 N.E.2d 735). Pertinent also are "the history of the times, the circumstances surrounding the statute's passage, and * * * attempted amendments" (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 124, at 253). Varying concerns may bear on the weight to be given legislative history (*see generally,* Abner J. Mikva and Eric Lane, An Introduction to Statutory Interpretation and the Legislative Process, at 27–41 [1997]), but they do not justify abandoning this Court's long tradition of using all available interpretive tools to ascertain the meaning of a statute.

Here, the history of section 1103(b) explicates the legislative intention to create a broad exemption from the rules of the road for all vehicles engaged in highway construction, maintenance or repair, regardless of their classification. In 1954, the Committee that proposed the original version of the statute stated that the law was intended to exempt from the rules of the road all teams and vehicles that "build highways, repair or maintain them, paint the pavement markings, remove the snow, sand the pavement and do similar work" (*see,* 1954 N.Y. Legis. Doc. No. 36, at 35). Thus, the exemption turns on the nature of the work being performed (construction, repair, maintenance or similar work)—not on the nature of the vehicle performing the work.

Further, the legislative history shows that the reference to "hazard vehicles" in section 1103(b) is wholly unrelated to the provision excusing vehicles engaged in road work from the rules of the road. Notably, the original version of *****628 **103** section 1103(b), enacted in 1957, exempted vehicles " engaged in work on a highway" from the rules of the road, and did *not* contain any separate provisions concerning hazard vehicles (*see,* L. 1957, ch. 698, § 4).[5] In 1970, the Legislature amended the Vehicle and Traffic Law to create the "hazard class" of vehicles, enacting section 117–a defining hazard vehicles, and amending section 1103(b) to exempt hazard vehicles from the standing, stopping ***465** and parking regulations (*see,* L. 1970, ch. 197). The Memorandum in Support of that amendment explained that it was intended to clear up confusion as to the meaning of different "flashing colored lights," and thus four distinct classes of vehicles were created (emergency vehicles, hazard vehicles, privately owned vehicles of volunteer firemen and privately owned vehicles of volunteer ambulance drivers), each of which is identified by a different colored flashing light (*see,* Bill Jacket, L. 1970, ch. 197, at 4). The amendment was not intended to curtail the exemption for any vehicles—including "hazard vehicles"—engaged in work on a highway (*see,* Dugan Letter, Bill Jacket, L. 1970, ch. 197, at 16 [noting the exemption of hazard vehicles and emergency vehicles from the rules of the road]).

Thus, we conclude that section 1103(b) exempts from the rules of the road all vehicles actually engaged in work on a highway, including the "hazard vehicles" in the cases before us.

The Standard of Care

We next turn to the standard of care owed to other drivers by vehicles "actually engaged in work on a highway." Originally, section 1103(b) provided such vehicles with an unqualified exemption from the rules of the road (*see,* L. 1957, ch. 698, § 4). In a 1974 amendment, the Legislature added the following sentence to that section:

> "The foregoing provisions of this subdivision shall not relieve any person, or team or any operator of a motor vehicle or other equipment while actually engaged in work on a highway from the duty to proceed at all times during all phases of such work with *due regard for the safety of all persons* nor shall the foregoing provisions protect such persons or teams or such operators of motor vehicles or other equipment from the consequences of their *reckless disregard for the safety of others* " (L. 1974, ch. 223, § 1) (emphasis added).

The legislative history explains that this amendment was designed to soften the outright exemption of vehicles engaged in

road work from the rules of the road, allowing them to drive at any speed or in any manner "which suits their fancy, without any prohibition from the Vehicle and Traffic Law" (*see,* Mem. of Senator Frank Padavan, Bill Jacket, L. 1974, ch. 223, at 4). For ***466** example, under the original version of the statute, "a snow plow could be operated well above the speed limit and through red lights * * * without regard for the safety of other persons" (Mem. of Dept. of Motor Vehicles, Bill Jacket, L. 1974, ch. 223, at 7). The Legislature therefore amended section 1103(b) to impose "a minimum standard of care" on operators of such vehicles (Padavan Mem., *op. cit.,* at 4).

In *Saarinen v. Kerr,* 84 N.Y.2d 494, 620 N.Y.S.2d 297, 644 N.E.2d 988, we held that Vehicle and Traffic Law § 1104(e)—which contains identical language requiring emergency vehicles to act with "due regard for the safety of all persons" and holding drivers responsible for "the consequences of [their] reckless disregard for *****629 **104** the safety of others"—imposes a standard of recklessness. Specifically, this Court held that, under section 1104(e), a plaintiff seeking to recover for injuries caused by an emergency vehicle must show that " 'the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow' and has done so with conscious indifference to the outcome" (*id.,* at 501, 620 N.Y.S.2d 297, 644 N.E.2d 988 quoting Prosser and Keeton, Torts § 34, at 213 [5th ed.]).

Section 1103(b) imposes the same recklessness standard on vehicles actually engaged in work on a highway. The language here is the same language that we held in *Saarinen* to impose a recklessness standard. To be sure, as claimants point out, the statute uses the phrase "due regard" as well as "reckless disregard" to describe the standard. But as we stated in *Saarinen,* "the Legislature's specific reference to * * * *reckless disregard* * * * would be unnecessary and, in fact, inexplicable if the conventional criterion for negligence—reasonable care under the circumstances—were the intended standard" (*Saarinen v. Kerr, supra,* at 501, 620 N.Y.S.2d 297, 644 N.E.2d 988) (emphasis in original). Thus, "the only way to apply the statute is to read its general admonition to exercise 'due care' in light of its more specific reference to 'recklessness' " (*id.,* at 501–502, 620 N.Y.S.2d 297, 644 N.E.2d 988; *see also, Bliss v. State of New York,* 95 N.Y.2d 911, 719 N.Y.S.2d 631, 742 N.E.2d 106 [decided today]).

We decline claimants' invitation to read the "due regard" and "reckless disregard" language in section 1103(b) differently from our reading of those very words in section 1104(e). As a general principle of statutory construction, "whenever a word is used in a statute in one sense and with one meaning, and subsequently the same word is used in a statute on the same subject matter, it is understood as having been used in the same sense" (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 236, at 402).

***467** Nor is there anything in the context or history of the statutes indicating that different meanings were intended. In fact, the history of section 1103(b) confirms that the Legislature intended to subject vehicles engaged in road work to the same standard of care as emergency vehicles. The Attorney General's memorandum in support of the 1974 amendment states that the bill "extends the standard of care presently applicable to drivers of authorized emergency vehicles under § 1104 * * * to persons engaged in maintenance and hazardous operations" (Lefkowitz Mem., Bill Jacket, L. 1974, ch. 223, at 2). In addition, Senator Padavan's supporting memorandum states that the amendment imposes a standard "similar to that imposed on operators of authorized emergency vehicles" (Padavan Mem., *op. cit.,* Bill Jacket, at 4). Many other memoranda in the bill jacket confirm this understanding (*see,* Department of Transportation Mem., Bill Jacket, L. 1974, ch. 223, at 5; Department of Motor Vehicles Mem., Bill Jacket, L. 1974, ch. 223, at 6; New York State Police Mem., Bill Jacket, L. 1974, ch. 223, at 8; Association of Towns Mem., Bill Jacket, L. 1974, ch. 223, at 10). Undeniably then, the 1974 amendment was intended to subject vehicles engaged in road work to the same recklessness standard applicable to emergency vehicles under section 1104(e) (*see, McDonald v. State of New York,* 176 Misc.2d 130, 139, 673 N.Y.S.2d 512 [Ct.Cl.]).

Claimants urge that, as a matter of logic and fairness, vehicles engaged in road work should not enjoy the same level of protection as emergency vehicles, like police cars, fire trucks and ambulances. As we stated in *Saarinen,* the protection given to emergency vehicles under section 1104(e) "represents a recognition that the duties of police officers and other emergency personnel often bring them into conflict with the rules and laws that are intended to regulate citizens' daily conduct," *****630 **105** and that emergency personnel require a "qualified privilege to disregard those laws where necessary to carry out their important responsibilities" (*Saarinen v. Kerr, supra,* at 502, 620 N.Y.S.2d 297, 644 N.E.2d 988). The Court recognized, however, that giving emergency personnel this qualified privilege "will inevitably increase the risk of harm to innocent motorists and pedestrians," and "will necessarily escalate the over-all risk to the public at large"—an increased risk justified by the necessity of accomplishing an "immediate, specific law enforcement or public safety goal" (*id.,* at 502, 620 N.Y.S.2d

297, 644 N.E.2d 988).

As claimants point out, it is unclear that the increased risk to the public is similarly justified for all vehicles engaged in road work. Indeed, criticizing protections given to non-emergency ***468** vehicles under pre–1957 law, the Joint Legislative Committee that was convened to revise the Vehicle and Traffic Law also observed that the "reason for extending emergency privileges to non-emergency vehicles * * * is not apparent. * * * The danger to highway users and true emergency vehicles is greatly increased by the special status which is unnecessarily given to non-emergency vehicles" (1954 N.Y. Legis. Doc. No. 36, at 35). The trial court in *Gawelko v. State of New York,* 184 Misc.2d 581, 710 N.Y.S.2d 762 [Ct.Cl.] echoed that concern, questioning the present law:

> "Why, for example, should rural letter carriers or tow truck drivers be permitted, in the course of their work, to speed, drive on the wrong side of the road, ignore pedestrian rights and vehicular rights-of-way, and disregard traffic signs and signals—all without sirens or lights being employed—while the driver of an ambulance or civil defense vehicle must employ both lights and bells or sirens in order to be exempt from any rules of the road?" (*Id.,* at 584, 710 N.Y.S.2d 762; *see also, Cottingham v. State of New York,* 182 Misc.2d 928, 942, 701 N.Y.S.2d 290 [Ct.Cl.].)

Apt as those concerns may be, the Legislature has spoken clearly, giving vehicles engaged in road work the benefit of the same lesser standard of care as emergency vehicles. Any change in that standard, therefore, must come from the Legislature, not the courts.

Work Area

Finally, there is no merit to claimants' argument that the protections of section 1103(b) apply solely to vehicles operating in a designated "work area" as defined in Vehicle and Traffic Law § 160. Section 1103(b) states that a vehicle "actually engaged in work on a highway" is exempt from the rules of the road. The statute does not require that a vehicle be located in a designated "work area" in order to receive the protection. Significantly, section 160 was not enacted until 1984—long after section 1103(b) was adopted. Thus, there is no credible argument that the Legislature only had designated "work areas" in mind when it adopted section 1103(b).

Claimants' remaining arguments are without merit.

Accordingly, in each case the order of the Appellate Division should be affirmed, with costs.

***469** Judges SMITH, LEVINE, CIPARICK, WESLEY and ROSENBLATT concur.

In each case: Order affirmed, with costs.

All Citations

95 N.Y.2d 455, 742 N.E.2d 98, 719 N.Y.S.2d 623, 2000 N.Y. Slip Op. 10304

Footnotes

[1] Vehicle and Traffic Law § 117–a defines "hazard vehicle" as follows: "Every vehicle owned and operated or leased by a utility, whether public or private, used in the construction, maintenance and repair of its facilities, every vehicle specially equipped or designed for the towing or pushing of disabled vehicles, every vehicle engaged in highway maintenance, or in ice and snow removal where such operation involves the use of a public highway and vehicles driven by rural letter carriers while in the performance of their official duties." "Hazardous operation" is defined as the "operation, or parking, of a vehicle on or immediately adjacent to a public highway while such vehicle is actually engaged in an operation which would restrict, impede or

interfere with the normal flow of traffic" (Vehicle and Traffic Law § 117–b).

[2] This accorded with the common-law rule in other jurisdictions (*see,* Annotation, *Liability for Injury or Damage Caused by Snowplowing or Snow Removal Operations and Equipment,* 83 A.L.R.4th 5).

[3] Section 1103(b) states in its entirety: "Unless specifically made applicable, the provisions of this title, except the provisions of sections eleven hundred ninety-two through eleven hundred ninety-six of this chapter, shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway nor shall the provisions of subsection (a) of section twelve hundred two apply to hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway but shall apply to such persons and vehicles when traveling to or from such hazardous operation. The foregoing provisions of this subdivision shall not relieve any person, or team or any operator of a motor vehicle or other equipment while actually engaged in work on a highway from the duty to proceed at all times during all phases of such work with due regard for the safety of all persons nor shall the foregoing provisions protect such persons or teams or such operators of motor vehicles or other equipment from the consequences of their reckless disregard for the safety of others."

[4] To the extent that *Somersall v. New York Tel. Co.,* 74 A.D.2d 302, 307–309, 427 N.Y.S.2d 247, *revd. on other grounds* 52 N.Y.2d 157, 436 N.Y.S.2d 858, 418 N.E.2d 373 holds otherwise, that decision is not to be followed.

[5] The original version of section 1103(b) stated in its entirety: "Unless specifically made applicable, the provisions of this title shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway nor shall the provisions of subsection (a) of section twelve hundred two apply to vehicles operated by public service corporations while actually engaged in work on the installation or maintenance of public service facilities on or adjacent to a highway but shall apply to such persons and vehicles when traveling to or from such work."

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215 A.D.2d 191
Supreme Court, Appellate Division, First Department, New York.

Jonathan RUTTENBERG, Plaintiff–Respondent,
v.
DAVIDGE DATA SYSTEMS CORPORATION, et al., Defendants–Appellants.

May 11, 1995.

Synopsis
Shareholder of closed corporation brought suit to compel repurchase of his stock, after he voluntarily terminated his employment with corporation. The Supreme Court, New York County, Schackman, J., entered summary judgment in favor of former employee and appeal was taken. The Supreme Court, Appellate Division, held that provision of stock repurchase agreement, triggering repurchase obligation "upon termination of employment by the Corporation or any Stockholder for any reason whatever * * * " did not require repurchase when stockholder voluntarily terminated employment.

Reversed; summary judgment motion denied.

Murphy, P.J., dissented and filed opinion in which Asch, J., joined.

Attorneys and Law Firms

****174** W.L. Kinnally, Jr., for plaintiff-respondent.

K. Kamien, for defendants-appellants.

Before MURPHY, P.J., and RUBIN, ASCH, WILLIAMS and MAZZARELLI, JJ.

Opinion

***191** MEMORANDUM DECISION.

Order of the Supreme Court, New York County (Walter Schackman, J.), entered on or about March 11, 1994 which, to the extent appealed from, granted plaintiff's cross-motion for summary judgment on the first and third causes of action and set the matter ****175** down for an assessment of damages, reversed, on the law, and the motion denied, without costs.

In this breach of contract action, we are asked to interpret a "buy-sell" agreement signed by plaintiff Jonathan Ruttenberg, and defendant Nicholas A. Davidge, president and owner of the majority of outstanding shares of stock in defendant Davidge Data Systems Corporation. According to the record, Nicholas A. Davidge owns 80 shares of the corporate stock. In round numbers, John W. Davidge III owns 27 shares, plaintiff owns 6 shares and someone identified only as "Russ" owns or has options to purchase 3.5 shares. Again using round figures, the Davidge family owns more than 90% of the outstanding shares on a fully diluted basis, leaving no doubt that the corporation is closely held.

At issue on plaintiff's motion for summary judgment is the meaning of the sentence: "Upon termination of employment by the Corporation of any Stockholder for any reason whatever, including, but not by way of limitation, death or disability of the Stockholder, all of the shares of the capital stock of the Corporation owned by him or her and to which he or she or his or her personal representatives shall be entitled shall be subject to the terms hereof." The provision states that the ***192** corporation will acquire the shares of the employee at a price to be determined by a formula set forth in section III of the contract.

Plaintiff resigned from the corporation and worked briefly for a law firm. He then took a position with Fusion Systems Corporation, which defendants assert to be in direct competition with Davidge Data Systems Corporation. Defendants, relying on the express language of the buy-sell agreement, refused to purchase plaintiff's stock under these circumstances. Plaintiff then brought this action for breach of contract.

Specifically at issue in this case is whether plaintiff's voluntary departure from his position with the corporation implicates its obligation to acquire his shares under the terms of the buy-sell agreement. It should be noted that plaintiff does not contend he is being deprived of the beneficial ownership of his shares in Davidge Data Systems Corporation. He continues to enjoy the rights of a stockholder, including entitlement to any dividends or distributions which the corporation may declare. Thus, no equitable basis is advanced which might warrant reformation of the parties' contract.

Supreme Court granted plaintiff's motion for summary judgment, referring the matter to a Special Referee for assessment of damages. The court found that the purpose of the agreement was apparent from the face of the instrument, declining defendant's offer of extrinsic proof regarding the parties' intent. The court determined that the interpretation placed upon the disputed provision by defendants "nullifies the purpose of the agreement—to ensure that all stock is held by employees/affiliates of Davidge Corp. accomplished by restricting the transfer of stock."

On appeal, plaintiff similarly argues that the purpose of a buy-sell agreement is "to make sure that the stock in the corporation is in the hands of persons who have a unity of interest in the corporation, generally current officers, directors and employees." Defendants contend that the disputed contract condition "[u]pon termination of employment by the Corporation" means exactly what it says and that Supreme Court erred in expanding the meaning of "termination" to encompass plaintiff's voluntary departure from his position of employment with the corporation.

Where a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence ***193** (*West, Weir & Bartel v. Carter Paint Co.,* 25 N.Y.2d 535, 540, 307 N.Y.S.2d 449, 255 N.E.2d 709). "However, when the meaning of the contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented which cannot be resolved on a motion for summary judgment" (*Eden Music Corp. v. Times Sq. Music Publs.,* 127 A.D.2d 161, 164, 514 N.Y.S.2d 3). Applying these rules to an asserted contract ambiguity, the Appellate Division, Second Department, noted: "[w]here the intention of the parties may be gathered from the four ****176** corners of the instrument, interpretation of the contract is a question of law, and * * * no trial is necessary to determine the legal effect of the contract [citations omitted]. * * * Mere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact." (*Federal Deposit Ins. Corp. v. Herald Square Fabrics Corp.,* 81 A.D.2d 168, 180, 439 N.Y.S.2d 944, *appeal dismissed* 55 N.Y.2d 602, 447 N.Y.S.2d 1025, 431 N.E.2d 643).

Supreme Court decided that the intent of the parties was clear from the language of the contract, without the need to resort to extrinsic evidence. However, it was plaintiff that raised the issue of conflicting interpretations of the disputed contract provision in the reply brief on his cross-motion for summary judgment. In that plaintiff has conceded the potential ambiguity of the crucial sentence in the contract, it is appropriate to examine the agreement to determine whether, as plaintiff contends, his reading of its terms is the only one that avoids offending both logic and the rules of contract construction.

As noted in *Harris v. City of New York,* 147 A.D.2d 186, 191, 542 N.Y.S.2d 550, "It is well settled that, on a motion for summary judgment, the function of the court is one of issue finding, not issue determination" (*see also, IBM Credit Fin. Corp. v. Mazda Motor Mfg. [USA] Corp.,* 152 A.D.2d 451, 542 N.Y.S.2d 649). In deciding the motion before it, Supreme Court observed that there is "no explanation for the absence of any specific provision addressing the buy-back of the stock of an employee who severs his relationship with Davidge Corp." Having identified what it clearly deemed to be an obvious omission in the contract, the court continued, "in the face of an agreement the express purpose of which is to retain control over the stock of the corporation, defendants' contention that Davidge Corp. is not bound by the agreement when a stockholder-employee resigns of his or her own accord not only strains general principles of contract interpretation but defies logic."

Unless it can be said that the intent of the parties is ***194** apparent from the face of the agreement, the conclusion reached by Supreme Court requires weighing the evidence of their intent in drafting the agreement and making a finding of fact. This

determination, whether factual or legal, also involves certain assumptions regarding the purpose of a buy-sell agreement, assumptions which are not wholly accurate whether applied to such agreements in general or the subject contract in particular.

In his reply brief on the cross-motion, plaintiff points out that, in interpreting the buy-back provision, defendants construe the phrase "Upon termination of employment by the Corporation" to mean that the obligation to purchase plaintiff's shares only arises on condition that employment is terminated *by* the corporation. Thus, they construe the phrase "by the Corporation" to modify the word "termination". Plaintiff, however, argues that the phrase simply modifies the word "employment", meaning that if his "employment by the Corporation" is terminated, the buy-back provision becomes operative.

Leaving aside, for the moment, the question of which interpretation is preferable, it is clear that one purpose of a buy-sell agreement is, as Supreme Court stated, "to retain control over the stock of the corporation". Yet another is to avoid placing a shareowner in the position of owning unmarketable securities. In the absence of conditions that obligate the corporation to purchase the shareowner's holdings, disposal of shares is governed by the first sentence of the disputed contract provision. Entitled "Restrictions on Transfer", it states, *inter alia,* that shares may not be disposed of or encumbered "without advanced written consent of all other Stockholders". In this regard, it bears emphasis that the owners of the vast majority of shares in this closely held corporation are members of the Davidge family.

Significantly, Supreme Court's memorandum decision emphasizes that "the primary motivation for the agreement was Davidge Corp.'s desire to maintain a long-term relationship with plaintiff, a valued and productive employee". But having identified another obvious purpose of the agreement, it ****177** seems to have escaped the court's attention that a buy-sell agreement constitutes incentive to remain with the corporation only if its worth to the valued employee is contingent upon his ongoing affiliation with his employer.

Viewed from this perspective, the absence of a provision for repurchase of shares upon the employee's potential defection ***195** to a competitor can hardly be regarded as an oversight but rather must be taken to be an integral component of the agreement. That plaintiff, now apparently employed by a direct competitor of Davidge Data Systems Corporation, finds himself the owner of unmarketable shares is scarcely accidental but the intended outcome of his disloyalty. By focusing entirely upon one aspect of the contract before it and ignoring another aspect, prominently identified in its memorandum decision, Supreme Court strayed beyond issue identification and embarked upon issue resolution.

Contrary to Supreme Court's conclusion, it neither "strains general principles of contract interpretation" nor "defies logic" that the agreement was drafted to leave the departing employee with securities having no market value. Representing only a minority interest in a closely held concern, plaintiff's small holding cannot be used to impede corporate action or to affect corporate governance. In the absence of significance to the corporation, it is not in the best interests of either the majority shareowners or the corporation to acquire plaintiff's stock. Therefore, the absence of any requirement in the buy-sell agreement obliging the corporation to acquire plaintiff's shares under these circumstances is entirely logical. It should also be noted that, because of the potential for unmarketability, the restrictions on transfer are endorsed on the back of the stock certificates, as required by law (Uniform Commercial Code § 8–204[a]; *Matter of Bon Neuve Realty Corp.,* 196 A.D.2d 694, 601 N.Y.S.2d 491).

Plaintiff's position on appeal—that his is the only viable interpretation of the buy-sell agreement—is not supported by an examination of the language of the agreement. Nor is the practical effect of its implementation, as construed by defendants, illogical in light of the acknowledged purpose of the agreement in retaining plaintiff as an employee of the corporation.

Interpreting the contract as plaintiff urges and as Supreme Court purported to do, under general rules of contract construction and without resort to extrinsic evidence, produces a result that is no more beneficial to plaintiff's case. The difficulty arises from his proposed interpretation of the phrase "Upon termination of employment by the Corporation * * * for any reason". The practical effect of reading the words "by the Corporation" as modifying "employment" is to render them nugatory. If, as plaintiff contends, the obligation to purchase stock arises from his separation from his position of employment, the phrase might as well read "Upon termination ***196** of employment * * * for any reason", rendering the words "by the Corporation" mere surplusage.

The law is settled that "such interpretation is not preferred and will be avoided if possible" (*Garza v. Marine Transp. Lines,*

861 F.2d 23, 27 [2d Cir.1988], citing *Rothenberg v. Lincoln Farm Camp,* 755 F.2d 1017, 1019 [2d Cir.1985]). It is a recognized " 'rule of construction that a court should not "adopt an interpretation" which will operate to leave a "provision of a contract * * * without force and effect" ' " (*Laba v. Carey,* 29 N.Y.2d 302, 308, 327 N.Y.S.2d 613, 277 N.E.2d 641, quoting *Muzak Corp. v. Hotel Taft Corp.,* 1 N.Y.2d 42, 46, 150 N.Y.S.2d 171, 133 N.E.2d 688; *Spaulding v. Benenati,* 57 N.Y.2d 418, 425, 456 N.Y.S.2d 733, 442 N.E.2d 1244). An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation (*Interspiro USA v. Figgie Intl.,* 18 F.3d 927, 932 [Fed.Cir.1994], citing *Laba v. Carey, supra; Granite Constr. Co. v. United States,* 962 F.2d 998, 1003 [Fed.Cir.1992], *cert. denied* 506 U.S. 1048, 113 S.Ct. 965, 122 L.Ed.2d 121; *National Equip. Rental, Ltd. v. Reagin,* 338 F.2d 759, 762–63 [2d Cir.1964], citing *Rentways, Inc. v. O'Neill Milk & Cream Co.,* 308 N.Y. 342, 347, 126 N.E.2d 271; ****178** *Fortec Constructors v. United States,* 760 F.2d 1288, 1292 [Fed.Cir.1985]; *Systemized of New England v. SCM, Inc.,* 732 F.2d 1030, 1034 [1st Cir.1984]).

The interpretation proposed by plaintiff offends the rule of construction that a contract shall be read so as to give effect to each and every term and is not supportable as a matter of law. Nor is it necessarily insignificant that the provision uses the expression "Upon termination of employment *by* the Corporation" rather than "Upon termination of employment *with* the Corporation", which would render the contract susceptible to precisely the meaning plaintiff would accord it.

Plaintiff's proposed construction of the buy-sell agreement also removes the burden of proving the condition precedent from the proponent of the contractual obligation (5 Williston, Contracts § 674, at 179–181 [3d ed]; 3A Corbin, Contracts § 749, at 467–468). As this Court emphasized in *Paz v. Singer Co.,* 151 A.D.2d 234, 235, 542 N.Y.S.2d 10, "It is black letter law that the burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it (Fisch, Evidence, § 1098, 2d ed)." As we noted in *Lindenbaum v. Royco Prop. Corp.,* 165 A.D.2d 254, 258, 567 N.Y.S.2d 218, " 'The party to whom the duty is owed usually has the burden of proving the occurrence of conditions precedent to the performance of the duty. The party burdened by the duty, however, usually has the burden of proving the discharge of his duty by the occurrence of a condition subsequent' (Calamari & Perillo, Contracts § 140, at 227–228)." Since ***197** plaintiff has, at best, raised an ambiguity in the provision he relies upon, it cannot be said, as a matter of law, that he has proved the occurrence of a condition precedent to defendants' obligation to purchase his stock so as to entitle him to summary judgment.

On its face, the agreement accords plaintiff no right to payment for his shares except "[u]pon termination of employment by the Corporation", including termination on account of death or disability. Plaintiff would have this Court read into the contract an obligation to repurchase his ownership interest upon his voluntary resignation. As noted, this is a situation that is expressly governed by the general provisions of the agreement restricting stock transfer. The imposition upon defendants of the obligation to purchase plaintiff's stock under such circumstances is not the resolution of an ambiguity, as the dissent postulates, but the rewriting of the contract to add a right that it simply does not bestow upon plaintiff. As we stated in *85th St. Rest. Corp. v. Sanders,* 194 A.D.2d 324, 326, 600 N.Y.S.2d 1, "This Court will not rewrite the terms of an agreement under the guise of interpretation (*Halkedis v Two E. End Ave. Apt. Corp.,* 137 AD2d 452, 453 [525 N.Y.S.2d 31], *affd* 72 NY2d 933 [532 N.Y.S.2d 843, 529 N.E.2d 173]). Summary judgment is appropriate only where the intent of the parties can be ascertained from the face of their agreement (*see, Pharmaceutical Horizons v. Sterling Drug,* 127 AD2d 514, 515 [512 N.Y.S.2d 30], *lv dismissed* 69 NY2d 984 [516 N.Y.S.2d 1027, 509 N.E.2d 362]), and where determination of that intent requires resort to extrinsic evidence, summary judgment must be denied (*Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.,* 32 NY2d 285, 291 [344 N.Y.S.2d 925, 298 N.E.2d 96]; *IBM Credit Fin. Corp. v Mazda Motor Mfg. [USA] Corp.,* 152 AD2d 451, 452 [542 N.Y.S.2d 649])."

Defendants urge that, irrespective of any ambiguity in the language of the agreement, extrinsic evidence should be admitted to establish the parties' intent with respect to purchase of an employee's interest in the corporation. It suffices to say that, in view of the potential ambiguity discerned by plaintiff, there is sufficient lack of clarity within the four corners of the instrument to create a material issue of fact, warranting the introduction of such proof. "When an ambiguity arises from a written agreement, the intention of the parties must be ascertained in the light of the surrounding facts and circumstances. Parol evidence is admissible for this reason" (*Tobin v. Union News Co.,* 18 A.D.2d 243, 245, 239 N.Y.S.2d 22, *affd.* 13 N.Y.2d 1155, 247 N.Y.S.2d 385, 196 N.E.2d 735). While the condition at bar is written into the contract and only arguably ambiguous, the observation made in *Hicks v. Bush,* 10 N.Y.2d 488, 491, 225 N.Y.S.2d 34, 180 N.E.2d 425 is pertinent: "the parol evidence rule does not bar proof of every orally established condition precedent, but only ***198** of those which ****179** in a real sense contradict the terms of the written agreement." Defendants have identified the affidavit of Nicholas Davidge as the particular parol evidence upon which they rely and have thus established grounds to defeat plaintiff's cross-motion for

summary judgment (*Sutton v. East Riv. Sav. Bank,* 83 A.D.2d 801, 441 N.Y.S.2d 819, *affd.* 55 N.Y.2d 550, 450 N.Y.S.2d 460, 435 N.E.2d 1075; *Federal Deposit Ins. Corp. v. Herald Sq. Fabrics Corp., supra,* at 181, 439 N.Y.S.2d 944).

All concur except MURPHY, P.J., and ASCH, J., who dissent in a memorandum by MURPHY, P.J., as follows:

MURPHY, Presiding Justice (dissenting).

On the well reasoned opinion of Schackman, J., I would affirm. The purpose of the agreement clearly was to enable the stockholders of defendant closed corporation to retain control, a fact reflected in the "whereas" clause, declaring that "the Stockholders and the Corporation believe that it is in their best interests to provide for certain restrictions on the transfer of the stock of the Corporation now held by them or to be issued to them in the future." Not only is the transfer of shares, by any means, prohibited without the "advanced written consent of all other Stockholders," but "termination of employment by the Corporation of any Stockholder for any reason whatever" authorizes the corporation to purchase, at a price set forth in the agreement, all of the shares of the departing stockholder.

Contrary to the position of defendants, it is clear that defendants' obligation to purchase arises upon the termination of plaintiff's employment with the corporation, not upon his being discharged by the company. Significantly, the phrase "termination of employment by the Corporation of any Stockholder for any reason whatever," specifically states that such termination includes, but is not limited to, the death or disability of the shareholder, neither of which is within the control of the corporation. As the Court of Appeals explained in *Sutton v. East Riv. Sav. Bank,* 55 N.Y.2d 550, 555, 450 N.Y.S.2d 460, 435 N.E.2d 1075, "in searching for the probable intent of the parties, lest form swallow substance, our goal must be to accord the words of the contract their 'fair and reasonable meaning'."

Under defendants' anomalous construction, an unsatisfactory employee of Davidge Corp., upon being fired, would be required to sell back his stock and receive what defendants call a "parachute", while a perfectly satisfactory employee upon his voluntary departure would be forced to keep his stock and the corporation would have no obligation to repurchase it. Are we to suppose that defendant in drafting the agreement intended to reward dishonest employees while ***199** penalizing those who prior to their resignation had rendered good and loyal service?

Defendants, having given an expansive definition to the word "termination" in the contract may not now complain that, because plaintiff disappointed them by suddenly leaving their employ, it could not have been contemplated that he simply be permitted to walk away with a windfall. "It is established that an ambiguity in a contract must be construed against the party who drafted it" (*BT Commercial Corp. v. Blum,* 175 A.D.2d 43, 44, 572 N.Y.S.2d 10), and the instrument herein was drawn up by defendants.

All Citations

215 A.D.2d 191, 626 N.Y.S.2d 174

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146 A.D.3d 1
Supreme Court, Appellate Division, First Department, New York.

SKANSKA USA BUILDING INC., Plaintiff–Appellant–Respondent,
v.
ATLANTIC YARDS B2 OWNER, LLC, et al., Defendants–Respondents–Appellants,
ABC Companies, LLC, et al., Defendants.
Associated General Contractors of NYS, LLC, Amicus Curiae.

1353, 652680/14, 1352
|
Oct. 20, 2016.

Synopsis

Background: Construction management contractor brought action against private property developer on public land and its affiliates, alleging breach of contract and seeking to pierce the corporate veil. Defendants moved to dismiss based on documentary evidence and failure to state a claim, and plaintiff moved to disqualify law firm from representing defendants. The Supreme Court, New York County, Saliann Scarpulla, J., granted defendants' motion in part and denied motion in part, and denied plaintiff's motion. Defendants appealed.

Holdings: The Supreme Court, Appellate Division, Acosta, J.P., held that:

as matter of first impression, statute governing liens under contracts for public improvements did not require private developer on public land to post a bond to guarantee an affiliate's performance under construction management agreement;

contractor adequately stated a claim for breach of the construction management agreement;

contractor failed to state a veil-piercing claim; and

trial court providently exercised its discretion in denying contractor's motion to disqualify.

Affirmed as modified.

Gische, J., filed opinion dissenting in part.

Attorneys and Law Firms

****48** Peckar & Abramson, P.C., New York (Bruce D. Meller and Peter E. Moran of counsel), for appellant-respondent.

Kramer Levin Naftalis & Frankel LLP, New York (Harold P. Weinberger, Nathan M. Hammeerman and Kaavya Viswanathan of counsel), and Troutman Sanders LLP, New York (Lee W. Stremba, Aaron Abraham and Kevin P. Wallace of counsel), for respondents-appellants.

Couch White, LLP, Albany (Jennifer K. Harvey and Joel M. Howard, III of counsel), for amicus curiae.

ROLANDO T. ACOSTA, J.P., DAVID B. SAXE, JUDITH J. GISCHE, TROY K. WEBBER, MARCY L. KAHN, JJ.

Opinion

ACOSTA, J.P.

***4** This case gives us the opportunity to interpret the language of Lien Law § 5, which provides that a private developer on public land must post a bond or other undertaking guaranteeing prompt payment to the contractor. We also address piercing the corporate veil in litigation involving sophisticated entities, as well as several breach of contract claims and attorney disqualification. These issues arose in the context of construction litigation between plaintiff and its affiliates, an international construction conglomerate, and defendants Atlantic Yards B2 Owner LLC (B2 Owner) and Forest City Ratner Companies, LLC (Forest City) and their affiliates, the developers of the Atlantic Yards project in Brooklyn. Specifically, the litigation revolved around the construction of a high-rise residential tower called "B2." B2 was to be built using innovative prefabricated modular units developed by defendant Forest City that would then be stacked together by plaintiff to form the high-rise. For the reasons stated below, we decline to adopt plaintiff's interpretation that Lien Law § 5 is satisfied by ***5** the posting of a bond only and not a guarantee as was done here. We also find that plaintiff failed to plead a veil-piercing claim. As the facts show, both parties were very sophisticated, and negotiated in minute detail all aspects of their agreements to build B2 using innovative technology. That the ****49** project failed does not lead to a veil-piercing claim, especially since plaintiff failed to identify the alleged fraud or other wrongdoing. We also reinstate the claim based on inadequate factory and labor, and decline to disqualify one of defendants' law firms based on a conflict of interest.

Background

In July 2006, the Empire State Development Corporation (ESDC), a state actor, adopted a plan for the Atlantic Yards Land Use Improvement and Civil Project, a 22–acre mixed-use development project in Brooklyn, to be anchored by the Barclay Center sports arena. As part of this project, in March 2010, ESDC entered into an interim lease agreement with AYDC Interim Developer, LLC, an entity affiliated with defendant B2 Owner, for construction of a number of buildings near the Barclays Center sports arena.

One of these buildings, the B2 Residential Project (B2 Building), was a proposed 34–story residential building containing 350 units. The B2 Building was to be erected with innovative modular construction, i.e., assembled pre-manufactured modular units. The modular construction concept was based on proprietary technology and design developed by defendant Forest City, also an affiliate of B2 Owner.

Forest City invited plaintiff, an international construction conglomerate, to participate in establishing a factory to construct the modules near the B2 site, and then to assemble the modules into the B2 Building. In June 2012, plaintiff and FCRC Modular, LLC (a Forest City affiliate) entered into a "Contract for Module Fabrication and Testing Services" (the Testing Agreement). The Testing Agreement contemplated a joint effort by plaintiff and the Forest City entities to build and test the modular units to be used in the B2 Building, with the goal of entering into a joint venture for construction of a full-blown modular factory facility.

On October 31, 2012, affiliates of plaintiff and Forest City executed three agreements in furtherance of the B2 Project. FCRC Modular, Skanska Modular, LLC (a daughter company of plaintiff), together with (as to certain portions) plaintiff and ***6** B2 Owner, entered into an "LLC Agreement" establishing FC+Skanska Modular, LLC (FC Skanska), to build and operate the modular factory. The LLC Agreement was, in sum, a joint venture among the parties, wherein Forest City affiliates supplied the modular unit intellectual property (including the fruits of the Testing Agreement), plus some capital, and plaintiff's affiliates supplied capital and construction know-how. The LLC Agreement made Skanska Modular the managing member for purposes of day-to-day operations.

On the same day, FCRC Modular, Skanska Modular, and FC Skanska entered into an "Intellectual Property Transfer and Development Agreement" (IP Transfer Agreement), which conveyed the modular IP and fruits of the Testing Agreement to FC Skanska.

Finally, also on October 31, 2012, plaintiff and B2 Owner entered into a "Construction Management and Fabrication Services Agreement" (the CM Agreement). The CM Agreement provided for plaintiff to enter into a subcontract with FC Skanska, under which FC Skanska would supply the modular units and plaintiff would effect the assembly, in exchange for a contract price of $116,875,078.

Among its other provisions, the CM Agreement called for the B2 Project to be substantially completed 416 business days after B2 Owner issued a "Notice to Proceed." In the CM Agreement, plaintiff represented that it had conducted due diligence and had no reason to believe that ****50** the modular design was inadequate or would not permit construction as provided for in the CM Agreement. On the other hand, the CM Agreement recited that plaintiff could "rely upon and use" in its performance "information supplied to it by or on behalf of [B2] Owner and its [a]ffiliates." The CM Agreement further stated that plaintiff was "not responsible for defects and/or deficiencies in the Work attributable to [its] reliance upon any such information that is incorrect, inaccurate or incomplete," and provided further that plaintiff would "notify [B2] Owner promptly of any inaccuracies in such information ... so as to minimize potential delays."

The CM Agreement contemplated changes to the schedule for "Force Majeure Event [s]," "Owner–Caused Event[s]," and "Contractor–Caused Delay[s]." Plaintiff was entitled to extensions of time for Force Majeure and Owner–Caused Events, but only if it gave written notice within five days of its actual knowledge of the event, followed by a second notice within 45 ***7** days after the end of the event (or the initial notice). Moreover, time extensions were only available for events that "adversely impact[ed] activities on the critical path" of the construction schedule. The CM Agreement similarly provided for plaintiff to receive additional payment for Force Majeure or Owner–Caused Events if it gave timely notice.

B2 Owner could also request or direct changes in the scope of work. Either plaintiff or B2 Owner could terminate the CM Agreement for cause. B2 Owner could also terminate the CM Agreement for convenience. B2 Owner issued the Notice to Proceed on December 14, effective December 21, 2012. The deadline for substantial completion was July 25, 2014.

By a 146–page letter dated August 8, 2014, plaintiff gave B2 Owner notice of its intent to terminate the CM Agreement on account of dozens of alleged Force Majeure and Owner–Caused Events and other breaches. The letter specified 12 alleged periods of delay, each lasting between one week and as much as five months. Plaintiff attributed the delays to delays in the factory fit-out (i.e., the time to get the modular factory up and running); defects in Forest City's modular unit design technology; related negligence and failure to cooperate by B2 Owner's design professionals; and improper changes to the scope of work made by B2 Owner without the requisite change orders. Plaintiff also alleged that Forest City had breached the CM Agreement's requirement that it provide evidence of satisfactory financing for the project by, among other things, failing to post a bond required by Lien Law § 5. Plaintiff alleged that it had suffered damages in excess of $50 million.

On August 27, 2014, plaintiff stopped work on the project and shortly thereafter notified B2 Owner that the CM Agreement was terminated.

Complaint & Dismissal Motion

Plaintiff commenced this action asserting causes of action for breach of the CM Agreement. It claimed that defendants had breached the CM Agreement by, among other things, providing a defective design for the project, including an inadequately designed modular factory facility with inadequate labor, changing the project scope without issuing change orders, and failing to provide adequate security as required by the Lien Law. Plaintiff also asserted a cause of action alleging that B2 Owner was a mere alter ego of Forest City, and seeking to pierce Forest City's corporate veil. Plaintiff sought damages of at least $30 million.

***8** Defendants moved pursuant to CPLR 3211(a)(1) and (7) to dismiss the veil-piercing cause of action, as well as certain parts of plaintiff's breach of contract claims, including ****51** the claims that defendants violated Lien Law § 5, supplied a defectively designed modular factory and inadequate factory labor, and changed the project scope without appropriate change orders.

Plaintiff opposed the motion and cross-moved pursuant to CPLR 3211(c) for partial summary judgment on the issue of defendants' liability on the Lien Law § 5 claim.

Attorney Disqualification Motion

Plaintiff also moved to disqualify the law firm Troutman Sanders LLP (Troutman) as defendants' attorneys, on the ground of conflict of interest, inasmuch as Troutman represented two of plaintiff's affiliates in matters in Maryland and Florida. Plaintiff added that Troutman's representation of Forest City was adverse to the interests of one of its affiliate's directors, who was a named defendant in a related action in Supreme Court, New York County, brought by FCRC Modular.

Court's Decision on the Motion

The motion court dismissed subpart (f) of the first cause of action, which alleges that defendants breached the CM Agreement by failing to post a bond required under Lien Law § 5, and subpart (h), which alleges breach of the CM Agreement based on an inadequate factory and inadequate labor.

The motion court denied defendants' motion to dismiss subparts (a) and (b) of the first cause of action, which alleges breach of contract due to design defects, as well as subpart (c), which alleges breach of the parties' CM Agreement by improperly changing the scope of work. It also declined to dismiss the third cause of action, which seeks to pierce the corporate veil of defendants and their affiliates, and denied plaintiff's motion to disqualify Troutman.

Analysis

Lien Law § 5

Plaintiff argues that the text and legislative history of Lien Law § 5 demonstrate that Forest City Ratner Companies, LLC (FCRC) was required to post a bond to guarantee B2 Owner's performance under the CM Agreement. We disagree. Far from ***9** supporting plaintiff's argument, the statute's legislative history indicates that no bond—as opposed to some other sort of "undertaking," such as a guarantee—was required to be posted here.

Lien Law § 5, entitled "Liens under contracts for public improvements," provides, in relevant part:

> "Where no public fund has been established for the financing of a public improvement with estimated cost in excess of two hundred fifty thousand dollars, the chief financial officer of *the public owner shall require the private entity for whom the public improvement is being made to post, or cause to be posted, a bond or other form of undertaking guaranteeing prompt payment of moneys* due to the contractor, his or her subcontractors and to all persons furnishing labor or materials to the contractor or his or her subcontractors in the prosecution of the work on the public improvement" (emphasis added).

The statute dates back to the former Lien Law of 1897. Prior to 2004, the statute left a "gap," in that contractors working on projects being built by private developers, with private funds, but on public land, could not file liens against the public land or the private entity's leasehold interest (*see Matter of Paerdegat Boat & Racquet Club v. Zarrelli,* 57 N.Y.2d 966, 457 N.Y.S.2d 229, 443 N.E.2d 477 [1982], *revg. for reasons stated at* 83 A.D.2d 444, 449–452, 445 N.Y.S.2d 162 [2d Dept.1981] [Hopkins, J., concurring in part, dissenting ****52** in part]; *Plattsburgh Quarries v. Markoff,* 164 A.D.2d 30, 32, 563 N.Y.S.2d 139 [3d Dept.1990], *lv. denied* 77 N.Y.2d 809, 570 N.Y.S.2d 489, 573 N.E.2d 577 [1991]).

In 2004, the legislature acted to fill this gap by enacting the language highlighted above. This provides for the public owner, in the case of large private development projects on public land, to "require the private entity for whom the public improvement is being made to post, or cause to be posted, a bond or other form of undertaking guaranteeing prompt payment of moneys due to the contractor ... in the prosecution of the work on the public improvement" (L 2004, ch 155, § 1).

The crux of plaintiff's position is that the guarantee provided in this case does not comply with the law because it is not equivalent to a bond or "other form of undertaking" under the statute.

A statute, however, is to be construed so as to give meaning to each word (*see* McKinney's Statutes § 231). Black's Law Dictionary defines an "undertaking" first as "[a] promise, ***10** pledge, or engagement," and second as "[a] bail bond" (Black's Law Dictionary 1665 [9th ed 2009]). Similarly, the CPLR defines "Undertaking" first as "[a]ny obligation, whether or not the principal is a party thereto, which contains a covenant by a surety to pay the required amount, as specified therein, if any required condition ... is not fulfilled" (CPLR 2501[1]). Hence, an "undertaking," as distinct from a "bond," is simply a "formal promise [or] guarantee" (Black's Law Dictionary 1665 [9th ed 2009]).

That the legislature intended the term "undertaking" in Lien Law § 5 to mean a "guarantee" is strongly supported by the statute's legislative history, which indicates that the Governor vetoed an earlier version of the 2004 amendment that added the above quoted language because the earlier version would have required the posting of a bond in every instance, disallowing "other forms of security designed to guarantee payment" (Letter from Assembly sponsor, July 8, 2004, Bill Jacket, L 2004, ch 155 at 5). The senate sponsor of the amendment clarified that the phrase "or some other form of undertaking" was added to meet the Governor's concerns by providing "an alternative to posting a bond" (Letter from Assembly sponsor, July 15, 2004, Bill Jacket, L 2004, ch 155 at 3).

As defendants point out, ESDC met its obligations under the statute by causing a Forest City affiliate—Forest City Enterprises, Inc.—to issue a formal "Guaranty" that B2 Owner would "cause Substantial Completion of the Improvements and perform the Development Work," including "*to fully and punctually pay and discharge any and all costs, expenses and liabilities incurred for or in connection with the Guaranteed Work, including, but not limited to, the costs of constructing,* equipping and furnishing the Guaranteed Work" (emphasis added). This guarantee follows the letter of the statute, namely "guaranteeing prompt payment" to contractors. That there are better guarantees available, such as a letter of credit, as the dissent notes, is beside the point. ESDC, as the public owner, was satisfied with the guarantee issued by Forest City Enterprises, Inc. Certainly, if the legislature had wanted the guarantee to be on par with a letter of credit it could have said that or identified the various types of guarantees that would satisfy the statute.

Since plaintiff is seeking only to force defendants to post a bond under Lien Law § 5, we need not decide whether it would have standing to enforce the guaranty as against Forest City Enterprises, as a third-party beneficiary.

***11** *Breach of Contract*

Factory Facility and Labor

The motion court erred in dismissing subpart (h) of the first cause of action, ****53** which alleges breach of the CM Agreement based on an inadequate factory and inadequate labor. Plaintiff plausibly argues that the CM Agreement, particularly when viewed together with the parties' related and contemporaneously executed LLC and IP Transfer Agreements (*see BWA Corp. v. Alltrans Express U.S.A.,* 112 A.D.2d 850, 852, 493 N.Y.S.2d 1 [1st Dept.1985]), required B2 Owner to ensure that an adequate modular factory and factory labor force were in place before it issued the Notice to Proceed. Thus, the allegations that the factory and labor force were inadequate, causing project delays, adequately state a claim for breach of the CM Agreement.

Modular Unit Design Defects

The motion court upheld the claim that defendants breached the CM Agreement by providing defectively designed modular unit technology. Defendants argue that this claim is refuted by documentary evidence. Defendants' argument lacks merit.

CM Agreement § 5.4(b)(ii) defines an "Owner–Caused Event" as including "fault, neglect or other negligent or wrongful act or failure to act by [B2] Owner's ... Design Professionals." The CM Agreement makes clear that defendants designed the modular unit technology. Indeed, B2 Owner expressly represented that its professionals designed the modules and they were "sufficient for completion of the Work." Plaintiff alleges that the modular units, designed by defendants or their agents, were defective. Plaintiff thereby states a claim for breach of the CM Agreement.

Defendants' main argument is that plaintiff failed to provide timely notice as required to assert a claim for design defect under section 3.5 of the LLC Agreement, i.e., by December 7, 2012. However, the parties appear to have contemplated that such flaws could be identified after December 7, 2012. Indeed, while B2 Owner represented in the CM Agreement that the design was sufficient, it further agreed that any design defects would be "Owner–Caused Events." Certainly, there is tension between these provisions—as there is also with the disclaimers of warranties to which defendants point. However, such facial conflicts present questions of facts that are not suitable for resolution on this pre-answer motion to dismiss.

***12** *Changes to Scope of Work*

The motion court upheld the claim that defendants breached the CM Agreement by changing the scope of work without issuing appropriate change orders. Defendants argue that plaintiff waived this claim by failing to comply with the CM Agreement's notice provisions governing change orders.

The parties agree that plaintiff's compliance with the change order notice provision was a condition precedent to the assertion of a claim for unauthorized changes in the scope of work. However, the CPLR does not require a party asserting a contract claim to plead compliance with a condition precedent (CPLR 3015[a]). Instead, it is incumbent upon the party resisting the contract claim to plead the failure to comply with the condition precedent (*id.*). Given defendants' failure to plead, the motion court correctly declined to dismiss the breach of contract claims.

Piercing the Corporate Veil

Veil-piercing is a narrowly construed doctrine limiting "the accepted principles that a corporation exists independently of its owners ... and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners" (****54** *Matter of Morris v. New York State Dept. of Taxation & Fin.,* 82 N.Y.2d 135, 140, 603 N.Y.S.2d 807, 623 N.E.2d 1157 [1993]). The party seeking to pierce the corporate veil bears the heavy burden of "showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*id.* at 141, 603 N.Y.S.2d 807, 623 N.E.2d 1157; *Sheridan Broadcasting Corp. v. Small,* 19 A.D.3d 331, 332, 798 N.Y.S.2d 45 [1st Dept.2005]).

Here, plaintiff sets forth conclusory allegations merely reciting typical veil piercing factors (*see e.g. Brainstorms Internet Mktg. v. USA Networks,* 6 A.D.3d 318, 775 N.Y.S.2d 844 [1st Dept.2004]). It does not allege any fraud or malfeasance to support its attempt to reach FCRC or other third-party defendants. It alleges breach of contract claims against B2, but "a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil" (*Bonacasa Realty Co., LLC v. Salvatore,* 109 A.D.3d 946, 947, 972 N.Y.S.2d 84 [2d Dept.2013]).

Far from alleging that FCRC used B2 Owner to perpetrate a fraud, plaintiff, a sophisticated party, admits that it knowingly entered into the CM Agreement with B2 Owner, ***13** an entity formed to construct the project. Nowhere in the complaint does plaintiff allege that it believed it was contracting with or had rights vis-à-vis FCRC or any entity other than B2 Owner. Indeed, plaintiff could have negotiated for such rights. Having failed to do so, plaintiff cannot now claim that it was tricked

into contracting with B2 owner only and thus should be allowed to assert claims against FCRC (*see Spectra Sec. Software v. MuniBEX.com, Inc.,* 307 A.D.2d 835, 835, 763 N.Y.S.2d 313 [1st Dept.2003]; *Hillcrest Realty Co. v. Gottlieb,* 208 A.D.2d 803, 805, 618 N.Y.S.2d 394 [2d Dept.1994]; *see also Brunswick Corp. v. Waxman,* 599 F.2d 34, 36 [2d Cir.1979]). Thus, the veil-piercing claim should be dismissed.

Attorney Disqualification

A movant seeking disqualification of an opponent's counsel faces a heavy burden (*see Ullmann–Schneider v. Lacher & Lovell–Taylor PC,* 110 A.D.3d 469, 973 N.Y.S.2d 57 [1st Dept.2013]). A party has a right to be represented by counsel of its choice, and any restrictions on that right "must be carefully scrutinized" (*id.* at 469–470, 973 N.Y.S.2d 57 [internal quotation marks omitted]). Courts should also examine whether a motion to disqualify, made in ongoing litigation, is made for tactical purposes, so as to delay litigation and deprive an opponent of quality representation (*see Solow v. Grace & Co.,* 83 N.Y.2d 303, 310, 610 N.Y.S.2d 128, 632 N.E.2d 437 [1994]). The decision whether to grant a motion to disqualify rests in the discretion of the motion court (*see Macy's Inc. v. J.C. Penny Corp., Inc.,* 107 A.D.3d 616, 968 N.Y.S.2d 64 [1st Dept.2013]).

Skanska USA Civil Inc. (Skanska Civil) is a wholly owned subsidiary of Skanska USA Inc. Plaintiff is likewise a wholly owned subsidiary of Skanska USA. Skanska Civil holds entities which work in various regions of the United States, including Skanska USA Southeast Inc. (Skanska Southeast). Neither Skanska Southeast's Virginia litigation nor its Florida and Maryland transactional matters have any relationship to, or involve any of the same adverse parties as, the instant action. Nor does plaintiff allege that any of Troutman's Forest City litigation team members possesses any of plaintiff's confidential information, or that the ethical screen that Troutman has set up between its Forest City and Skanska attorneys is in any other way inadequate.

****55** The motion court therefore providently exercised its discretion in denying plaintiff's motion to disqualify the law firm. Plaintiff has not shown that, standing alone, Troutman's representation ***14** of corporate affiliates of plaintiff and adversity to one of the directors of one of plaintiff's affiliates creates a conflict of interest (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.7[a], 1.13[a]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

Accordingly, the order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered July 20, 2015, which, insofar as appealed from as limited by the briefs, granted the motion of defendants B2 Owner and Forest City to dismiss subparts (f) and (h) of the first cause of action and denied the motion to dismiss subparts (a), (b), and (c) of that cause of action and the third cause of action, and denied plaintiff's motion to disqualify the law firm of Troutman Sanders LLP as said defendants' attorneys, unanimously modified, on the law, to deny the motion to dismiss subpart (h) of the first cause of action, and to grant the motion to dismiss the third cause of action, and otherwise affirmed, without costs.

All concur except Gische and Kahn, JJ. who dissent in part in an Opinion by Gische, J.

GISCHE J. (dissenting in part).

While I am in agreement with most of the majority's decision, I depart with respect to its conclusion that defendants' Completion Guaranty is an appropriate undertaking that satisfies the requirements of Lien Law § 5. It is for this reason that I partially dissent and would reinstate subpart (f) of the first cause of action based upon defendants' alleged failure to post a bond or other undertaking as required by Lien Law § 5[1].

The Atlantic Yards Project[2] is a sprawling $4.9 billion mixed-use mega-development encompassing 22 acres of

underdeveloped public land. The New York State Development Corp d/b/a Empire State Development Corp (ESDC), a public benefit corporation created by the State of New York, partnered with defendant Forest City Ratner Companies, LLC (FCRC), a private developer, to implement and effectuate this ambitious redevelopment program, which was partly funded by the City and the State of New York. This appeal only concerns that part of the project involving the construction of a modular ***15** residential building located at 461 Dean Street in Brooklyn, referred to as the B2 tower. Defendant Atlantic Yards B2 Owner, LLC (B2 Owner), is an FCRC affiliate, as are many of the other entities involved at various stages of this project. Despite its description as "owner," B2 Owner does not, in fact, own fee title to the land upon which B2 tower is built. The land, which is publicly owned, was ultimately triple net leased by ESDC, as landlord, to another FCRC affiliate, FC Atlantic Yards B2, as tenant (Development Lease). The Development Lease, which gave the tenant the right to develop the land, was assigned to B2 Owner.

Many details of the overarching improvement project are set forth in the March 4, 2010 "Development Agreement" (Development Agreement), among ESDC, ****56** Atlantic Yards Development Company, LLC (AYDC), Brooklyn Arena, LLC, and AYDC Interim Developer, LLC (Interim Developer), an affiliate of B2 Owner. Plaintiff (Skanska) is not a party to this Development Agreement. One goal of the project was to have four towers built using modular units, because modular construction was believed to be an easier, faster, and more economical way to build than conventional construction. The B2 tower, now completed, is, at 32 stories tall, reportedly the world's tallest modular building.[3] Ultimately, it was the only tower at the project erected by modular construction.

Pursuant to a "Construction Management and Fabrication Services Agreement" (Construction Agreement) dated October 31, 2012, between B2 Owner and Skanska, it was agreed that Skanska would be responsible for the fabrication, delivery and erection of the modules; Skanska was also to perform and provide the attendant construction and construction management services necessary to erect the tower. There is no express requirement that B2 Owner comply with the Lien Law, although there is a general requirement that the parties comply with New York law. To further effectuate the terms of the Construction Agreement, FCRC and Skanska (and/or their respective affiliates) entered into a series of additional agreements. In one agreement, the parties joined forces to establish a new company, FC+Skanska Modular, LLC (FC+S). In a second agreement, the intellectual property of fabricating the ***16** modules, which belonged to FCRC, was transferred to FC+S. Skanska also executed another agreement, a subcontract with FC+S, making it the sole source subcontractor for fabrication of the modular units. The fabrication would take place offsite at a factory leased by FCRC; Skanska would then transport, deliver and stack them using cranes to form the tower.

Skanska is not a party to the Development Lease that was subsequently entered into as of December 14, 2012. The Development Lease expressly required the tenant, which had the rights of development, to comply with Lien Law § 5. It also expressly required that FCRC provide ESDC with a guaranty, which was made as of May 13, 2013 (Completion Guaranty).[4] The Completion Guaranty was a condition precedent to the commencement of work. In addition to guaranteeing completion of the work, FCRC also guaranteed that it would "use any and all amounts disbursed from time to time by the Construction Lender, solely to fully and punctually pay and discharge any and all costs, expenses and liabilities incurred for or in connection with the Guaranteed Work...."

Additionally, FCRC guaranteed that

> "the Guaranteed Work shall be and remain free and clear of all liens, encumbrances, claims, chattel mortgages, conditional bills of sale and other charges of any and all persons, firms, corporations or other entities furnishing materials, labor or services in constructing or completing the Guaranteed Work, provided that the Guarantor's obligations ... shall be limited solely to the extent Tenant ****57** or Guarantor shall have received a disbursement from the Construction Lender or otherwise, for the payment of such materials, labor or services"

The B2 tower was beset with production problems from the outset, and the deadline that had been set for its substantial completion (July 25, 2014) was not met, with each party blaming the other. In December 2013, FCRC announced that it was abandoning modular construction and that the next scheduled residential tower (B3) would be built using ***17** conventional construction methods. In August 2014, Skanska notified B2 Owner that B2 Owner had breached the Construction Agreement in numerous specific ways, demanding that the breaches be cured or it would stop working on the tower and terminate the contract. Unable to settle their differences, this and other related litigation ensued.

Insofar as the Lien Law claim is concerned, the motion court's basis for dismissal was that there is no provision in the

Construction Agreement expressly requiring defendants' compliance with the requirements of the Lien Law. In reaching the question of whether the Completion Guaranty satisfies Lien Law § 5, the majority implicitly accepts that the law applies to the parties' project, and I agree. This is a real estate development project involving publicly owned land improved by a private developer. The express terms of the Construction Agreement provide that the project is governed by the laws of the State of New York. That includes the Lien Law (*see Dolman v. United States Trust Co. of N.Y.,* 2 N.Y.2d 110, 116, 157 N.Y.S.2d 537, 138 N.E.2d 784 [1956]).

Defendants argue that even if Skanska can assert claims against them under Lien Law § 5, they are in compliance with the statute because, pursuant to the Development Lease, they provided ESDC with a Completion Guaranty. I disagree that the Completion Guaranty is a form of undertaking that satisfies the Lien Law. In general, the primary purpose of the Lien Law is to ensure that contractors, subcontractors, laborers and those who furnish materials in connection with the improvement of real property are promptly paid. Because the statute is remedial in nature, it is to be construed liberally to secure the beneficial interests and purposes thereof (Lien Law § 23). It is intended to protect financially those who have directly expended labor and materials to improve real property at the direction of a general contractor or owner of a construction project (*West–Fair Elec. Contrs. v. Aetna Cas. & Sur. Co.,* 87 N.Y.2d 148, 157, 638 N.Y.S.2d 394, 661 N.E.2d 967 [1995]). Although, depending upon whether the improvement is made to public or private land, the Lien Law provides for different means of protection, the objective of making sure that protected parties are promptly paid is the same.

A private improvement is any improvement of real property not belonging to the state or a public corporation, whereas a public improvement is an improvement of any real property belonging to the state or a public corporation (Lien Law § 2[7],[8]). If the improvement is made to private property, a mechanic's lien for the amount owed to the protected party ***18** may be filed upon the property improved, affecting the owner's right, title and interest in that real property. A mechanic's lien cannot, however, be filed against improved publicly owned land (*see Albany County Indus. Dev. Agency v. Gastinger Ries Walker Architects,* 144 A.D.2d 891, 892, 534 N.Y.S.2d 823 [3d Dept.1988], *appeal dismissed* 73 N.Y.2d 1010, 541 N.Y.S.2d 764, 539 N.E.2d 592 [1989], *lv. denied* 74 N.Y.2d 605, 543 N.Y.S.2d 398, 541 N.E.2d 427 [1989]; *Matter of* ****58** *Paerdegat Boat & Racquet Club v. Zarrelli,* 83 A.D.2d 444, 445 N.Y.S.2d 162 [2d Dept.1981], *revd.* 57 N.Y.2d 966, 457 N.Y.S.2d 229, 443 N.E.2d 477 [1982] [for the reasons stated in the concurring in part and dissenting in part opinion by former Justice James D. Hopkins at the Appellate Division 83 A.D.2d 444, 449–452, 445 N.Y.S.2d 162]). Instead, pursuant to Lien Law § 5, a protected party owed monies for improving public property may file a lien that attaches to the monies of the state or public corporation funding applicable to the improvement (Lien Law § 5; *Matter of Paerdegat,* 57 N.Y.2d at 968, 457 N.Y.S.2d 229, 443 N.E.2d 477, citing 83 A.D.2d at 449–452, 445 N.Y.S.2d 162).

There are, however, situations where a protected party provides labor, or materials, etc., to a private entity that is improving publicly owned land for the benefit of the private entity. In those situations, a protected party is still not entitled to file a mechanic's lien against the public property, notwithstanding that the benefits inure to a private entity (*Matter of Paerdegat Boat,* 57 N.Y.2d at 968, 457 N.Y.S.2d 229, 443 N.E.2d 477, *citing* 83 A.D.2d at 449–452, 445 N.Y.S.2d 162). Nor can the protected party attach any public funds applicable to the improvement, because no state or public corporation funding for the project has been established. In order to address this gap in protection, Lien Law § 5 was amended in 2004 to provide the following:

> "Where no public fund has been established for the financing to a public improvement with estimated cost in excess of two hundred fifty thousand dollars, the chief financial officer of the public owner shall require the private entity for whom the public improvement is being made to post, or cause to be posted, a bond or other form of undertaking guaranteeing prompt payment of the moneys due to the contractor, his or her subcontractors and to all persons furnishing labor or materials to the contractor or his or her subcontractors in the prosecution of the work on the public improvement."

The allegations in the complaint implicate the type of hybrid public/private improvement project contemplated by the 2004 Lien Law amendment, because a private entity has leased ***19** property from a public corporation, and constructed a tower. Although the parties disagree about whether the beneficial interest inures to the benefit of the public or the private entity, there are facts alleged supporting Skanska's claim that this is a hybrid improvement project primarily inuring to FCRC's benefit (*see Davidson Pipe Supply Co. v. Wyoming County Indus. Dev. Agency,* 85 N.Y.2d 281, 624 N.Y.S.2d 92, 648 N.E.2d 468 [1995]).[5] Thus, under the facts pleaded, Lien Law § 5's requirements in situations where there is no public fund apply, thereby obligating the public owner to require the private entity to "post, or cause to be posted, a bond or other form of undertaking."

Defendants argue that even if Lien Law § 5 applies to this project, ESDC can accept some form of security other than a bond. Furthermore, they maintain that the nature and extent of the security is completely within the discretion of the public owner, claiming that in this case ESDC could have, had it wanted to, simply accepted the private developer's representations of creditworthiness as a satisfactory ****59** undertaking. Defendants maintain that FCRC's Completion Guaranty is, therefore, an acceptable and suitable "other form of undertaking," within ESDC's exercise of discretion.

B2 Owner is correct that Lien Law § 5 does not exclusively require the filing of a bond as security in these circumstances, because the express statutory language permits another form of undertaking. Not just any form of alternative security, however, will suffice. In order to achieve the objective of the Lien Law, and consistent with the legislative history of the amendment, any alternative undertaking must provide substantially equivalent protection to that provided by a bond. The alternative undertaking should be a financial arrangement that would afford an unpaid contractor, subcontractor, laborer, or provider of materials, a fund of money, or an asset, available for predictable and prompt payment. An identifiable fund of money, or a bond, or a lien against real property, are Lien Law remedies available in other contexts where services and materials are provided but not paid for, each having characteristics of ready availability.

A letter of credit, the alternative undertaking contemplated by Governor Pataki when the 2004 amendment was passed, ***20** would also fulfill these requirements. In vetoing an earlier bill to amend Lien Law § 5, Governor Pataki recommended that any new proposal should allow the public owner to require the private entity to "post" another form of undertaking, specifically suggesting a letter of credit as one possible alternative (New York State Legislative Annual 2004, Governor's Veto Message # 1, Posting of Payment Bonds, A 5805, L 2003 [Tocci], p475).[6] A letter of credit is an obligation undertaken by a bank to make a payment if the beneficiary fails to obtain direct payment from the applicant obtaining the letter of credit (*Nissho Iwai Europe PLC v. Korea First Bank,* 99 N.Y.2d 115, 120, 752 N.Y.S.2d 259, 782 N.E.2d 55 [2002], citing *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.,* 476 U.S. 426, 428, 106 S.Ct. 1931, 90 L.Ed.2d 428 [1986]; *see also BasicNet S.p.A.,* 127 A.D.3d 157, 4 N.Y.S.3d 27 [1st Dept.2015]). "[T]he issuing bank's obligation to honor drafts drawn on a letter of credit by the beneficiary is separate and independent from any obligation of its customer to the beneficiary under the ... contract and separate as well from any obligation of the issuer to its customer under their agreement" (*BasicNet S.p.A.,* 127 A.D.3d at 167, 4 N.Y.S.3d 27). Thus, a letter of credit is "superior to a normal surety bond or guaranty because the issuer is primarily liable and is precluded from asserting defenses that an ordinary guarantor could assert" (*id.*).

The Completion Guaranty that FCRC provided in this case was a requirement of the lease and a condition precedent to commencing the work. It guarantees that B2 Owner will substantially complete the project and apply money disbursed by its lender to do the work. Although the Completion Guaranty generically states that the work will be kept "free ... of liens," it is unclear how a mechanic's lien could be filed against the property, given its public nature, because "real property owned by a public corporation is immune to mechanic's liens" (*Albany County Indus. Dev. Agency v. Gastinger Ries Walker Architects,* 144 A.D.2d at 892, 534 N.Y.S.2d 823). A completion ****60** guaranty such as FCRC's merely "guarantees the completion of a project (usually a construction project) should the borrower be unable to do so" (*Turnberry Residential Ltd. Partner, L.P. v. Wilmington Trust FSB,* 99 A.D.3d 176, 177, 950 N.Y.S.2d 362 [2012], *lv. denied* 20 N.Y.3d 859, 2013 WL 518610 [2013]).

***21** The Completion Guaranty is not the functional equivalent of a bond or other form of undertaking, because it is no more than FCRC's contractual promise to complete the project and pay its account, which, if not honored, requires a lawsuit to secure a judgment and a collection process to obtain satisfaction (*see Crown Tire Co. v. Tire Assoc. of Fairport,* 177 A.D.2d 974, 577 N.Y.S.2d 1019 [4th Dept.1991]). Moreover, recovery is dependent upon a guarantor's particular financial circumstances at the time a protected party is in need of the remedies that the Lien Law provides. This is hardly the streamlined and predictable process Lien Law § 5 calls for in "guaranteeing prompt payment of the moneys due to the contractor ... in the prosecution of the work on the public improvement" where there are no public funds. Nor is it an identifiable fund or asset on which a protected party can draw down payment. In other words, contractors and subcontractors on hybrid construction projects would be in a worse position in terms of a remedy than their private and public improvement counterparts, eviscerating the underlying purpose of the 2004 amendment. While I agree with the majority that it is permissible under Lien Law § 5 for FCRC to satisfy its obligations by means other than a bond, the Completion Guarantee FCRC provided does not fulfill that obligation. I would, therefore, modify the order to deny dismissal of subpart (f) of the first cause of action.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 20, 2015, modified, on the law, to deny defendants Atlantic Yards B2 Owner, LLC and Forest City Ratner Companies, LLC's motion to dismiss subpart (h) of the

first cause of action and to grant their motion to dismiss the third cause of action, and otherwise affirmed, without costs.

Opinion by ACOSTA, J.P.All concur except GISCHE and KAHN, JJ. who dissent in part in an Opinion by GISCHE, J.

All Citations

146 A.D.3d 1, 40 N.Y.S.3d 46, 2016 N.Y. Slip Op. 06903

Footnotes

1 I do not reach plaintiff's request for partial summary judgment because this appeal concerns only Supreme court's disposition on defendants' CPLR 3211 motion to dismiss. Plaintiff did not appeal Supreme Court's denial of its request for summary judgment treatment under CPLR 3211(c).

2 The project has since been renamed and is now called Pacific Park, Brooklyn.

3 http://www.designboom.com/architecture/ shop–architects–461–dean–str eet–pacific–park–brooklyn–new–york–05–15–2016, accessed September 27, 2016.

4 There is also a December 14, 2012 "Completion Guaranty" by FCRC in favor of the Bank of New York Mellon, the bank that extended almost $93 million in credit. The parties primarily direct their argument to the May 13, 2013 guaranty, referring to it as the "Completion Guaranty," which nomenclature I adopt in this dissent.

5 Unlike *Davidson,* which involved a public agency that had only temporary status as an intermediary owner solely for tax purposes, here the land upon which B2 tower was constructed is still publicly owned (*Davidson,* 85 N.Y.2d at 286, 624 N.Y.S.2d 92, 648 N.E.2d 468).

6 In an internal memorandum dated July 20, 2004, sent by Governor Pataki's deputy counsel to the governor's counsel, reference is made to the governor's prior veto, because the prior bill "did not provide for security interests other than performance bonds (such as letters of credit)"(*see* Bill Jacket S.595 A).

295 N.Y. 286
Court of Appeals of New York.

TONIS
v.
BOARD OF REGENTS OF UNIVERSITY OF STATE OF NEW YORK.

April 18, 1946.

Synopsis
Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding in the matter of the application of Nicholas A. Tonis for an order of certiorari pursuant to Civil Practice Act, art. 78, s 1283 et seq., to review a determination of the Board of Regents of the University of the State of New York revoking petitioner's license to practice in the State of New York and canceling of record his registration as a physician. The proceeding was transferred to the Appellate Division of the Supreme Court by an order of the Supreme Court at Special Term, entered in Albany County. From an order, 270 App.Div. 50, 58 N.Y.S.2d 766, of the Appellate Division of the Supreme Court entered November 17, 1945, confirming the determination of the Board of Regents, Nicholas A. Tonis appeals.

Order reversed, determination of Board of Regents annulled, and matter remitted to Board of Regents.

Attorneys and Law Firms

****245 *287** Emanuel Wexler, Harry A. Gordon, and Irving Gordon, all of New York City, for appellant.

***288** Nathaniel L. Goldstein, Atty. Gen. (Henry S. Manley, Orrin G. Judd, Wendell P. Brown, and Edward L. Ryan, all of Albany, of counsel), for respondent.

Opinion

CONWAY, Judge.

This is an appeal from an order of the Appellate Division, Third Department, confirming the determination of respondent Board of Regents pursuant to which an order was made revoking petitioner's license to practice medicine in this State and canceling of record his registration as a physician. ****246** The revocation of license was upon the ground that petitioner had been convicted of a felony.

***289** The relevant provisions of the Education Law, Consol.Laws, c. 16, ss 1264, subd. 1; 1251, provide, in part, as follows:

's 1264. Revocation of certificates; annulment of registrations. 1. Whenever any practitioner of medicine shall be convicted of a felony, as defined in section twelve hundred and fifty-one of this article, the registration of the person so convicted may be annulled and his license revoked by the department. * * *'

's 1251. Qualifications. * * * The conviction of felony shall be the conviction of the offense which if committed within the state of New York would constitute a felony under the laws thereof. * * *' (Emphasis supplied.)

On December 5, 1944, petitioner, who was admitted to practice in 1920, pleaded guilty in the United States District Court,

Southern District of New York, to two counts of an indictment charging him with two violations of Internal Revenue Code, section 2554, 26 U.S.C.A. Int.Rev.Code, s 2554, in that on two occasions (one count for each occasion) he 'unlawfully, wilfully and knowingly did sell to John Port a quantity of a certain nacotic durg, to wit, approximately twenty one-quarter grain tablets, each tablet containing a quantity of morphine sulphate, a derivative and preparatiom of opium, * * * not in pursuance of a written order of the said John Port to the said defendant on a form issued in blank for that purpose by or under the authority of the Secretary of the Treasuy, * * *.' The certificate of conviction was entitled 'Sec. 2554 IR Code Unlawful sales of morphine sulphate,' and merely stated that defendant was sentenced to imprisonment for one year and one day, which sentence was suspended, that defendant was fined $500 and that the other counts were dismissed.

What petitioner actually did was not to sell the morphine (in the ordinary sense of the word 'sell') but to prescribe it for an addict, not in the course of his practice, and the prescription was filled by a druggist who acted in good faith without knowledge of the unlawful issuance of the prescription. After the Federal conviction, petitioner received a letter from the Assistant Commissioner of Education advising him that his license was subject to revocation by reason of a conviction of a felony, and giving him the opportunity to have a hearing. Petitioner then moved in the Federal court for an amendment ***290** of the certificate of conviction so as to show the true facts upon which the conviction was based. His motion was granted by the District Court Judge who wrote: 'I feel in the interest of justice that the application should be granted. The true fact is that what we actually call a sale was not made. It is a sale by reason of a legal conclusion. In other words, the defendant took a part in an act which was part of a whole transaction which eventually resulted in a sale.' The certificate was amended so as to read: '(The sales charged in the Indictment in counts 1 & 2 consisted of the following as a matter of fact: that on two different occasions defendant, a licensed physician, did, for a consideration, issue an order of prescription for morphine sulphate not in the regular course of his practice but to an addict for a prohibited use, although the prescription was filled by a druggist who acted in good faith without knowledge that the prescription was unlawfully used.)' The title of the amended certificate remained 'Unlawful sales of morphine sulphate' and the sentence was unchanged.

It is petitioner's contention that his acts in prescribing the drug were not offenses 'which if committed within the state of New York would constitute a felony under the laws thereof.' Education Law, s 125s, supra. The issue is of course not whether petitioner shall escape disciplinary action but whether his license may be automatically revoked without a hearing before the Medical Grievance Committee.

It seems clear to us that, while we may feel that petitioner's acts here were as morally reprehensible as if he had actually sold the drug (in the ordinary meaning of 'sold'), he could not have been convicted of a felony under the laws of this State. ****247** The Attorney-General, indeed, concedes that, while it is agreed that a sale to an addict is a felony, 'mere illegal prescribing without more is only a misdemeanor under State law,' and states the question presented to us as follows: 'The present case is the issuance of a narcotic prescription to an addict, with the intent and the result that there is a sale to the addict, although the doctor does not himself fill the prescription but it is filled by a druggist acting innocently and not in collusion with the doctor. Is that a felony? In other words, would the acts described constitute a 'sale' under the State law?'

***291** A brief summary of the history of the statutes involved is as follows: In 1927 a new article was added to the Public Health Law, Consol.Laws, c. 45, by Laws of 1927, chapter 672. Section 423 of that article provided as follows:

's 423. Acts prohibited. It shall be unlawful for any person to possess, have under his control, sell, distribute, administer, dispense, or perscribe any habit forming drug except as provided in this article.' (Emphasis supplied.)

Under section 421, three of the prohibited acts were defined as follows:

'8. 'Sale' includes barter, exchange or giving away, or offering therefor and each such transaction made by any person whether as principal, proprietor, agent, servant or employee.

'9. 'Dispense' includes distribute, leave with, give away, dispose of, and deliver to a person or to his agent to be delivered to him.

'10. 'Administer' means only administration by a person authorized to administer habit forming drugs.'

The word 'prescribe' was not defined.

All violations of the article were misdemeanors under section 443.

Then in 1929, by Laws of 1929, chapter 377, section 443 was amended so as to read:

's 443. Penalties. A violation of any provision of this article shall be punishable as provided in the penal law.' A new section (s 1751) was added to the Penal Law, Consol.Laws, c. 40, by Laws of 1929, chapter 377, section 2, which made certain of the prohibited acts felonies instead of misdemeanors. It provided: 's 1751. Violations of public health law with respect to habit forming drugs. Any person who shall peddle, sell, barter, or exchange any habit forming drug, in violation of article twenty-two of the public health law, shall be guilty of a felony, punishable by imprisonment for a term not exceeding ten years.

'Any person who shall violate any provision of such article, other than as above specified, shall be guilty of a misdemeanor, punishable * * *.' (Emphasis supplied.)

It is clear that 'prescribe' was not made a felony by that section, but remained a misdemeanor.

***292** In 1933 the Uniform Narcotic Drug Act was adopted (L.1933, ch. 684) and the 1927 article repealed. However, the sections relevant here remained in substance unchanged. Former section 423 prohibiting certain acts became the present section 422 of the Public Health Law and provided:

's 422. Acts prohibited. It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized in this article.' (Emphasis supplied.)

The definitions (present s 421) remained in substance the same except that the definition of 'administer' was omitted. A sale is defined as follows: '10. 'Sale' includes barter, exchange, or gift, or offer therefor, and each such transaction made by any person, whether as principal, proprietor, agent, servant or employee.' As before, the word 'prescribe' was not defined.

As to the Penal Law the present sections remain substantially the same, former section 1751 being divided into two sections, 1751 and 1751-a (L.1938, ch. 168, ss 1, 2).

Although the Attorney-General concedes that 'to prescribe' taken alone is merely a misdemeanor, the substance of his argument is that while petitioner would ****248** have been guilty of a misdemeanor if no sale had followed, still, since a sale was made (although by an innocent person), the act of prescribing became a felony because the petitioner thus participated in a sale. The argument might be a cogent one under a statute such as the United States Internal Revenue Code, section 2554, 26 U.S.C.A. Int.Rev.Code, s 2554, where there is no differentiation between 'sell' and 'prescribe,' That statute reads as follows: 's 2554. Order Forms. General requirement. It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.' See Jin Fuey Moy v. United States, 254 U.S. 189, 192, 41 S.Ct. 98, 65 L.Ed. 214, and Linder v. United States, 268 U.S. 5, 20, 22, 45 S.Ct. 446, 69 L.Ed. 819, 39 A.L.R. 229, in which the Jin Fuey Moy case was limited to its facts.

Our state statute follows a definite plan. Public Health Law section 422, quoted (supra), lists the eight prohibited acts. ***293** Unless authorized in the article (art. 22), they are unlawful. Provisions therein authorize the doing of each of the acts under certain circumstances. Thus, taking the prohibited acts in order, the following sections give authority: to manufacture, section 423; to possess, section 432; to sell, by manufacturers and wholesalers, sections 423 and 424; to sell by apothecaries, section 426; to prescribe, by physician, dentist or veterinarian, section 427; to administer, by physician, dentist, veterinarian, nurse or interne, section 427; to dispense, by physician, dentist or veterinarian, section 427; to compound, sections 423 and 424. The unlawful issuance of a prescription by a physician is to 'prescribe,' as indicated in sections 422 and 427. It is not to 'sell,' as prohibited in section 422 and defined in section 421, subdivision 10. To hold otherwise would be to remove the word 'prescribe' from section 422, despite the fact that the Legislature has written it in alongside the word 'sell.' It is one of the accepted canons of construction that statutes must be read so that each word will have a meaning, and not so read that one word will cancel out and render meaningless another; that each word used in an enumeration in a statute of several classes or things must be presumed to have been used to express a distinct and different idea; that every provision of a statute was intended to serve some useful purpose. Palmer v. Van Santvoord, 153 N.Y. 612, 616, 617, 47 N.E. 915, 916, 38 L.R.A. 402; Allen v. Stevens, 161 N.Y. 122, 145, 55 N.E. 568, 574.

People v. Gennaro, 261 App.Div. 533, 26 N.Y.S.2d 336, affirmed 287 N.Y. 657, 39 N.E.2d 283, involved a true sale of heroin and not a transaction whereby a duly licensed physician illegally prescribed for an addict. It is not applicable here.

The order of the Appellate Division should be reversed, with costs, the determination of the Board of Regents annulled, and the matter remitted to the Board of Regents for further proceedings not inconsistent with this opinion.

LOUGHRAN, C. J., and LEWIS, DESMOND, THACHER, DYE, and MEDALIE, JJ., concur.

Ordered accordingly.

All Citations

295 N.Y. 286, 67 N.E.2d 245

34 N.Y.3d 520
Court of Appeals of New York.

In the Matter of Patricia WALSH, Appellant,
v.
NEW YORK STATE COMPTROLLER et al., Respondents.

No. 82
|
November 25, 2019

Synopsis

Background: County correction officer brought proceeding pursuant to CPLR article 78 for judicial review of New York State Comptroller's denial of her application for performance of duty disability retirement benefits that had been made on basis that she was permanently disabled due to injuries sustained when intoxicated inmate stumbled and fell on her during transport. The Supreme Court, Albany County, transferred proceeding. The Supreme Court, Appellate Division, Devine, J., 78 N.Y.S.3d 734, 161 A.D.3d 1495, confirmed the determination, and officer appealed.

The Court of Appeals, Feinman, J., held that officer was entitled to performance of duty disability retirement benefits, since governing statute did not limit predicate acts to volitional or disobedient acts.

Reversed and remitted.

Wilson, J., issued opinion concurring.

Rivera, J., dissented.

Attorneys and Law Firms

****954 ***210** Edelstein & Grossman, New York City (Jonathan I. Edelstein of counsel), for appellant.

Letitia James, Attorney General, Albany (Victor Paladino, William E. Storrs, Barbara D. Underwood and Andrew Oser of counsel), for respondents.

OPINION OF THE COURT

FEINMAN, J.

***522** An inmate accidentally fell as she attempted to exit the back of a transport van, injuring petitioner, a Nassau County correction officer. The question before us is whether petitioner's injuries were sustained by, or as the natural and proximate

result of, "any act of any inmate," within the meaning of Retirement and Social Security Law § 607–c (a). We conclude that they were.

On March 19, 2012, petitioner and fellow correction officer Thomas Cocchiola were directed to transport a female inmate from a court to the Nassau County jail. When they arrived at the court, they found that the inmate had difficulty standing and appeared to be under the influence of drugs or alcohol. The officers escorted the inmate, who was handcuffed and weighed about 200 pounds, from the basement area up to the garage. The inmate was not steady on her feet, and the officers assisted her as she walked.

The officers led the inmate to the transport van, and helped her maintain her balance as she climbed the steps into the van. Upon arriving back at the jail, petitioner opened the back of the van and instructed the inmate to exit. The inmate took one to two steps forward and fell out of the van head first, landing on petitioner. Both petitioner and the inmate fell to the ground. Officer Cocchiola and other officers assisted in lifting the inmate off petitioner, and petitioner was taken to a hospital. Petitioner's rotator cuff was torn, her cervical spine was damaged, and her lower back was injured.

Based on this incident and her resulting injuries, petitioner applied for performance-of-duty disability retirement benefits pursuant to Retirement and Social Security Law § 607–c (a). Respondents New York State Comptroller and New York State and Local Employees' Retirement System denied her application on the ground that the "alleged cause of disability" "was not the result of an act of any inmate or person confined in an institution" within the meaning of section 607–c. After conducting a hearing upon petitioner's request for a redetermination, the hearing officer recommended denying petitioner's ***211 **955** application. The hearing officer reasoned that:

> ***523** "[a]ltercations between inmates and between inmates and officers, resulting in injuries to correction officers, were the impetus for the legislative action cited here. Reference was specifically made to officers' exposure to violence, assault, transmissible disease and other life threatening conditions. Those factors are not present here. The applicant's mishap is more appropriately attributed to her failure to carefully execute her task of removing an inmate from the van."

Respondents then issued a final determination denying petitioner's application.

Petitioner then commenced this CPLR article 78 proceeding, seeking to annul respondents' determination. Upon transfer from Supreme Court, the Appellate Division confirmed the determination and dismissed the petition (161 A.D.3d 1495, 1497, 78 N.Y.S.3d 734 [3d Dept. 2018]). The Court stated that, although the phrase "any act of any inmate" in section 607–c (a) is not statutorily defined, the Appellate Division has interpreted this language to require a showing that the claimed injuries "were caused by direct interaction with an inmate" and, further, were "caused by some affirmative act on the part of the inmate" (*id.* at 1496, 78 N.Y.S.3d 734). While recognizing that an "affirmative act" need not be "intentionally aimed" at the officer, the Court stated that the act needs to be "volitional or disobedient" in a manner that proximately causes the injury (*id.*). The Court reasoned that, in this case, "by all accounts, the inmate in question could barely walk or stand unassisted," and "the hearing testimony reflects that she simply lost her footing and fell" (*id.* at 1497, 78 N.Y.S.3d 734). The Court concluded that petitioner's injuries did not occur contemporaneously with, and flow directly, naturally and proximately from, any disobedient and affirmative act of the inmate (*id.*). This Court granted leave to appeal (*see* 32 N.Y.3d 905, 84 N.Y.S.3d 860, 109 N.E.3d 1160 [2018]).

In CPLR article 78 proceedings to review determinations of administrative tribunals, this Court's typical standard of review is whether there was substantial evidence to support the hearing officer's decision (*Matter of Wilson v. City of White Plains*, 95 N.Y.2d 783, 784–785, 710 N.Y.S.2d 303, 731 N.E.2d 1111 [2000]). Here, however, because an issue of statutory interpretation underlies this question, we engage in de novo review of the statutory interpretation (*see National Energy Marketers Assn. v. New York State Pub. Serv. Commn.*, 33 N.Y.3d 336, 347 and n. 5, 103 N.Y.S.3d 1, 126 N.E.3d 1041 [2019], *rearg.* ***524** *denied* 33 N.Y.3d 1130, 109 N.Y.S.3d 210, 132 N.E.3d 1090 [2019]). Because the meaning of "any act of any inmate" is an issue of pure statutory interpretation, we "need not accord any deference to the agency's determination" (*Matter of DeVera v. Elia*, 32 N.Y.3d 423, 434, 93 N.Y.S.3d 198, 117 N.E.3d 757 [2018]).

"When presented with a question of statutory interpretation, a court's primary consideration is to ascertain and give effect to the intention of the Legislature" (*Nadkos, Inc. v. Preferred Contrs. Ins. Co. Risk Retention Group LLC*, 34 N.Y.3d 1, 7, 108 N.Y.S.3d 375, 132 N.E.3d 568 [2019] [internal quotation marks omitted], quoting *Matter of Lemma v. Nassau County Police Officer Indem. Bd.*, 31 N.Y.3d 523, 528, 80 N.Y.S.3d 669, 105 N.E.3d 1250 [2018]). We have long held that the statutory text is the clearest indicator of legislative intent, and that a court "should construe unambiguous language to give effect to its

plain meaning" (*id.*). "In the absence of a statutory definition, we construe ****956 ***212** words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts in determining the meaning of a word or phrase" (*id.* [internal quotation marks omitted], quoting *Yaniveth R. v. LTD Realty Co.*, 27 N.Y.3d 186, 192, 32 N.Y.S.3d 10, 51 N.E.3d 521 [2016]). Where the statutory language is unambiguous, a court need not resort to legislative history (*He v. Troon Mgt., Inc.*, 34 N.Y.3d 167, 169–71, 114 N.Y.S.3d 14, 137 N.E.3d 469 [2019]). Further, a statute "must be construed as a whole and [ ] its various sections must be considered together and with reference to each other" (*Matter of New York County Lawyers' Assn. v. Bloomberg*, 19 N.Y.3d 712, 721, 955 N.Y.S.2d 835, 979 N.E.2d 1162 [2012]).

Retirement and Social Security Law § 607–c (a) provides the circumstances under which county correction officers are entitled to performance-of-duty disability retirement benefits. As relevant here, it states that a county correction officer

> "who becomes physically or mentally incapacitated for the performance of duties as the natural and proximate result of an injury, sustained in the performance or discharge of his or her duties by, or as the natural and proximate result of *any act of any inmate* or any person confined in an institution under the jurisdiction of such county, shall be paid a performance of duty disability retirement allowance ..." (emphasis added).

Section 607–c is one of several statutes in the Retirement and Social Security Law that use the term "act of any inmate" in ***525** connection with providing performance-of-duty disability retirement benefits to different members of the retirement system (*see e.g.* Retirement and Social Security Law § 507–c [providing benefits to uniformed personnel in the New York City Department of Correction]; *see also id.* §§ 63–a, 63–b, 507–b). The term "act of any inmate" was originally used in sections 63–a and 507–b, which provide benefits to members in the "uniformed personnel in institutions under the jurisdiction of the department of corrections and community supervision or a security hospital treatment assistant."[1]

The term "any act of any inmate" is not defined in the Retirement and Social Security Law. Petitioner contends that the Appellate Division erred in restricting the word "act" in section 607–c (a) to "volitional or disobedient" acts. We agree and conclude that our analysis need not go beyond the statutory text because the term's plain meaning and the overall context provided by section 607–c compel an interpretation of "any act of any inmate" that includes both voluntary and involuntary conduct of an inmate, including the accidental fall at issue here.

"Act" is a word of "ordinary import," and thus it should be given its "usual and commonly understood meaning" (*see Nadkos, Inc.*, 34 N.Y.3d at 3, 108 N.Y.S.3d 375, 132 N.E.3d 568). Dictionaries broadly define "act." For example, Black's Law Dictionary defines "act" as "something done or performed, esp. voluntarily; a deed" (Black's Law Dictionary 24–25 [7th ed. 1999]).[2] Black's Law Dictionary also ****957 ***213** quotes the Model Penal Code § 1.13, which defines "act" as ***526** a "bodily movement whether voluntary or involuntary." Perhaps most importantly, in the Penal Law, the New York legislature defined "act" as "a bodily movement," and provided a separate definition for "voluntary act" (Penal Law § 15.00[1]-[2] [1965]).[3]

Despite disparities among these definitions, the usual and commonly understood meaning of the word "act," including the meaning adopted by the legislature in the Penal Law, does not comprise a requirement of voluntariness.[4] Indeed, from as early as 1871, in various types of cases, this Court has used the term "involuntary act," indicating that acts can be involuntary (*see e.g. Giryluk v. Giryluk*, 23 N.Y.2d 894, 895, 298 N.Y.S.2d 91, 245 N.E.2d 818 [1969] ["the signing of the confession of judgment was an *involuntary act* on the part of the wife" (emphasis added)]; *Weed v. Mut. Ben. Life Ins. Co.*, 70 N.Y. 561, 561 [1877] ["the *involuntary act* of an insane person" (emphasis added)]; *Mallory v. Travelers' Ins. Co.*, 47 N.Y. 52, 56 [1871] ["if it was such that he could not be held in his own mind to know that he was doing an act which would produce death, then he was an involuntary agent, and the result of that *involuntary act* producing death was an accident" (emphasis added)]).

Moreover, falling is commonly understood to be an act. Merriam–Webster's defines the noun "fall" as "the *act* of falling by the force of gravity" (Merriam–Webster's Collegiate Dictionary 418 [10th ed. 1996]). And this Court repeatedly uses the term "*act* of falling" (*see e.g. Keavey v. New York State Dormitory Auth.*, 6 N.Y.3d 859, 860, 816 N.Y.S.2d 722, 849 N.E.2d 945 [2006] [the "*act of falling* into a five- to six-inch gap between insulation boards" (emphasis added)]; *Ithaca Tr. Co. v. Driscoll Bros. & Co.*, 220 N.Y. 617, 618, 115 N.E. 1041 [1917] ["they could not find the defendant guilty of negligence unless the specific *act of falling* was caused in whole or in part by the opening in the floor" (emphasis added)]).

In section 607–c (a), the legislature chose to use the broad term "any act of any inmate." If the legislature intended to exclude

the injuries at issue here, it could ****958 ***214** have easily drafted ***527** the statutory language more restrictively, for example, by adding limitations to the word "act." In fact, the legislature did just that in subdivision (f) of the same statute (*see* Retirement and Social Security Law § 607–c [f] ["by, or as the natural and proximate result of an *intentional or reckless act* of any civilian visiting" (emphasis added)]). While many ways in which the legislature could have narrowed the term come easily to mind, it is hard to imagine how it could have written the statute more broadly.

Though the word "act" broadly includes voluntary and involuntary conduct, the statute is not without limitation. First, the statute requires that the injury be sustained "by" or "as the natural and proximate result of" the act. The statute further limits covered acts to those "*of* any inmate" (*id.* § 607–c [a] [emphasis added])—the act, whether voluntary or involuntary, must be attributable to the inmate. In other words, section 607–c (a) covers any conduct originating from an inmate's internal processes, including volitional and nonvolitional movements, such as an accidental fall.

The dissent criticizes us for failing to consider the "spirit and purpose" of the statute (dissenting op at 532, 542–43, 122 N.Y.S.3d at 217–18, 224–25, 144 N.E.3d at 961–62, 968–69). Our task, however, is to give effect to the text. But, even if we were to consider the legislative history, it is inconclusive. While we agree with the dissent insofar as there seemed to have been a desire to provide protections to correction officers because they "come into daily contact with certain persons who are dangerous, profoundly anti-social and who pose a serious threat to their health and safety" (Governor's Approval Mem, Bill Jacket, L 1996, ch. 722 at 9), inmates may be "dangerous" and pose a "serious threat" as much through their involuntary acts as by their voluntary acts.

Here, the inmate took one to two steps, lost her balance, and landed on petitioner, injuring her. Petitioner's injuries were thus sustained by "any act of any inmate," i.e., the inmate's fall on petitioner. Accordingly, the judgment of the Appellate Division should be reversed, with costs, and the matter remitted to the Appellate Division, with directions to remand to respondents for further proceedings in accordance with this opinion.

WILSON, J. (concurring).

I concur completely with the majority. I write separately to make an additional point: the structure of the statute and its legislative history both support the majority's conclusion that the term "act" includes volitional and nonvolitional conduct.

***528** I.

Section 607–c(a)of the Retirement and Social Security Law states that a county corrections officer:

> "who becomes physically or mentally incapacitated for the performance of duties *as* the natural and proximate result of an injury, sustained in the performance or discharge of his or her duties by, *or as* the natural and proximate result of any act of any inmate or any person confined in an institution under the jurisdiction of such county, shall be paid a performance of duty disability retirement allowance ..." (emphasis added).

The two "as" clauses separated by "or" make clear that there are two separate paths by which an officer may demonstrate the entitlement to recovery under the statute. Thus, a corrections officer qualifies for performance of duty benefits if the officer becomes incapacitated either (1) "as the natural and proximate result of an injury, ****959 ***215** sustained in the performance or discharge of his or duties by ... any act of any inmate" or (2) "as the natural and proximate result of any act of any inmate" (Retirement and Social Security Law § 607–c[a]). The statute is simpler to understand if we take the clauses in reverse order.

Under the second clause, an officer recovers if she becomes disabled as "the natural and proximate result of any act of any inmate." That route provides recovery for all officer disabilities where the disability is a natural and foreseeable result of an

inmate's act. Thus, it covers intentional acts of inmates, volitional acts of inmates, and even acts of inmates that involve no direct physical contact with the officer – so long as the disability is proximately caused by the act. Therefore, this second path covers the garden-variety of inmate-caused officer disabilities – not just disabilities caused by an officer subduing a violent inmate or an officer who is the target of an inmate's physical attack, but also acts of inmates that involve no direct contact between the inmate and the officer. For example, if an inmate has booby trapped his cell, and an officer conducting a search of the cell becomes disabled by the booby trap, the second clause would cover the officer so long as the disability was a natural and foreseeable consequence of the inmate's act.

Now to the first path. Because under the second route the disability must be the natural and proximate result of any act ***529** of any inmate, the first clause must be understood to provide coverage in situations not reached by the second. What acts of inmates that injure an officer do so in an unforeseeable way? Nonvolitional acts. Unlike the second clause, the first clause does not require that an inmate's act proximately causes an officer's disability. Instead, it requires that the officer's *injury be caused* "by ... any act of any inmate," and that the officer's *disability* flow proximately from the injury. That is, the first path reaches acts of inmates where the inmates' acts are not the proximate cause of the injury, so long as the disability is the sort that would ordinarily flow from that type of injury.

Although it might be possible to dream up some volitional act of an inmate that injures an officer but lacks proximate cause, the legislature surely was concerned with real-world occurrences, not Rube–Goldbergesque inventions. Seizures, actions by mentally unstable inmates that are involuntary, acts by inmates under the influence of drugs, involuntary acts by inmates who are ill are all among the hazards corrections officers regularly face. The first path, then – aimed at acts for which the injury is not foreseeable – exists to reach nonvolitional acts of inmates. However, the legislature restricted that path to injuries sustained while an officer was performing her duties, and further limited to disabilities that proximately flowed from the injury. For example, if during a seizure, an officer is injured by the inmate's nonvolitional acts, even if the officer's resulting disability might not be the foreseeable result of an inmate's seizure (hence barring recovery under path two), path one provides for recovery if the officer was performing her duties when injured and if the injury (e.g., spinal damage) was the proximate cause of the disability.

Importantly, if we were to read this statute as the dissent does, to include only affirmative or volitional acts of inmates, there would be no reason to have the first clause at all. Every affirmative act would fall under the second clause, because all volitional acts of inmates resulting in an officer's disability would have proximately caused the disability. If the first clause is ****960 ***216** to retain any meaning, it must cover some "acts" not covered by the second clause. Those acts include direct contact between officers and inmates in which the inmate's act did not proximately cause the disability. Giving all parts of the statute meaning, as we should whenever possible (*Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 515, 577 N.Y.S.2d 219, 583 N.E.2d 932 [1991]), the statute requires "act" to include both volitional and nonvolitional acts. ***530** Under the first route, an officer will be able to recover if his or her injury arises from physical contact with an inmate regardless of whether the inmate's act was volitional. Under the second route, an officer recovers only if the injury is proximately caused by an act of an inmate regardless of whether the inmate made physical contact with the officer. Therefore, an "act" need not be volitional under section 607–c(a).

Here, even if the inmate's act of falling out of the van and on top of Officer Walsh was involuntary, under the first clause of the statute Officer Walsh would be entitled to recover, so long as her injury was the proximate cause of her disability. She was injured by an act of an inmate and was engaged in the performance of her duties. As the majority concludes, her injuries "were thus sustained by 'any act of any inmate' " (majority op. at 527, 122 N.Y.S.3d at 214, 144 N.E.3d at 958).

II.

Contrary to the dissent's interpretation, a careful reading of the legislative history supports the majority's conclusion that "act" includes both volitional and nonvolitional acts. As the dissent notes, the legislature provided enhanced benefits to corrections officers because a defining feature of their job is that they "come into contact with" inmates.

Of course, as the dissent recognizes (*see* dissenting op. at 538, 542, 122 N.Y.S.3d at 222, 224–25, 144 N.E.3d at 966, 968–69), interpreting "act" to include both volitional and nonvolitional acts will result in the provision of benefits to more corrections officers than if act included only volitional acts. That is what the legislature intended. Although the dissent bemoans the result that an inmate's misstep or fall on top of an officer will result in benefits (*id.*), the legislative history suggests the purpose of the statute was to provide enhanced benefits to officers because they "come into daily contact with" inmates (Gov. Approval Mem., Bill Jacket, L. 1996, ch. 722, at 5). There is no suggestion that the contact need be volitional.* The history further suggests the statute was intended to increase the amount of benefits the ***531** state would pay out to its employees (*see generally* Budget Report, Bill Jacket, L. 1996, ch. 722, at 7–8). That this statute does in fact provide more benefits to more officers is consistent with its express purpose: expanding benefits to corrections officers because they come into daily contact with inmates.

The selection of a two-tier system as opposed to a three-tier system further supports the majority's conclusion that "act" includes nonvolitional acts. Unlike police officers, who receive benefits under a three-tier system (*see generally Kelly v. DiNapoli*, 30 N.Y.3d 674, 689, 70 N.Y.S.3d 881, 94 N.E.3d 444 [2018] [Wilson, J., dissenting] *****217**), ****961** section 607–c provides just two tracks – one for ordinary retirement benefits and one for performance of duty benefits. Accounting for just two tracks, the budget report noted that this statute "would provide a greater disability benefit to state [corrections officers] ... than that afforded to most other Tier 2, 3, and 4 state and local employees" (Budget Report, Bill Jacket, L. 1996, ch. 722, at 7–8). Thus, the legislature deliberately passed a bill that provided for enhanced benefits for corrections officers on a two-tier system, superior to those available on the three-tier system.

This makes perfect sense: unlike police officers who often face dangerous conditions but also often engage in activities that pose little or no risk, corrections officers spend every moment of their working lives inside the prison walls, surrounded and outnumbered by inmates who have been convicted of crimes, many quite serious. Corrections officers "work in a setting that necessitates a strong disability protection in the event of a career ending injury" (Sponsor's Mem, Bill Jacket, L. 1999, ch. 639, at 5). That constant contact with inmates led to the legislature's electing to compensate corrections officers, who are "required to work daily with the most dangerous persons in our society" (Sponsor's Mem, Bill Jacket, L 1996, ch 722, at 3), on a two-tier system.

Rather than "undermin[ing]" the legislature's goals (dissenting op. at 538, 122 N.Y.S.3d at 222, 144 N.E.3d at 968), the interpretation of "act" to include both volitional and nonvolitional acts better conforms to the legislature's expectation that section 607–c would expand the pension system and provide more corrections officers more benefits under a two-tier system. Taken together with the text and the structure of the statute, those considerations establish that "act" was intended to include both nonvolitional and volitional acts.

RIVERA, J. (dissenting).

Performance-of-duty pension benefits ***532** are available under Retirement and Social Security Law § 607–c (a) only to those correction officers who suffer a permanent disability from injuries proximately caused by "any act of any inmate." Both the text of the statute and the legislative history demonstrate that the legislature intended to limit these enhanced benefits—to be distinguished from ordinary disability benefits—to cases involving volitional inmate conduct, in recognition of the inherent dangers of working in a carceral environment, in close proximity to a prison population.

Here, because it is undisputed that the inmate accidentally slipped and fell on petitioner, the injuries are not the result of an act of an inmate and so the Comptroller properly denied her request for performance-of-duty benefits. The majority's holding that an "act" means any physical movement of an inmate, and thus includes an inmate's slip and fall, is based on a misreading of the text and secondary sources, all the while ignoring the "spirit and purpose of the statute and the objectives sought to be accomplished by the legislature" (*Matter of Hernandez v. Barrios–Paoli*, 93 N.Y.2d 781, 786, 698 N.Y.S.2d 590, 720 N.E.2d 866 [1999]). I dissent.

I.

Petitioner Patricia Walsh, a Nassau County Sheriff's Department corrections officer transporting an inmate from a court appearance to the county jail, was injured after she directed the inmate to exit the van and the inmate fell on top of her. Petitioner sought performance-of-duty (POD) disability retirement benefits under Retirement and Social Security Law (RSSL) § 607–c (a), claiming permanent ****962 ***218** disability due to the injuries suffered as a result of her contact with the inmate during the fall.

The New York State Comptroller denied the benefits and petitioner requested a hearing and reconsideration. At the hearing, petitioner testified that the inmate appeared intoxicated or high on drugs and fell out of the van as she exited, hitting the pavement and landing on petitioner, who attempted to prevent the fall. The other correction officer who assisted with the transport similarly testified that the inmate appeared to be under the influence of alcohol or drugs and that she "just fell out of the van on top of" petitioner. The Comptroller subsequently accepted the hearing officer's recommendation to deny benefits.

Petitioner commenced this CPLR article 78 proceeding to vacate, annul and set aside the Comptroller's decision as unsupported ***533** by substantial evidence, and requesting a judicial determination that she is entitled to RSSL 607–c (a) disability benefits. The Appellate Division unanimously upheld the Comptroller's denial of benefits, concluding the inmate's fall onto petitioner was not a disobedient or affirmative act, adding that testimony established the inmate "could barely walk or stand unassisted" and "simply lost her footing and fell" (161 A.D.3d 1495, 1497, 78 N.Y.S.3d 734 [3d Dept. 2018]). We granted Walsh leave to appeal (32 N.Y.3d 905, 84 N.Y.S.3d 860, 109 N.E.3d 1160 [2018]). I would affirm, albeit without fully adopting the rationale of the Appellate Division.

II.

In a CPLR article 78 proceeding reviewing an agency determination after an administrative hearing, this Court's review is limited to whether the decision is supported by substantial evidence (*Matter of Kelly v. DiNapoli*, 30 N.Y.3d 674, 684, 70 N.Y.S.3d 881, 94 N.E.3d 444 [2018]). "Where the rationality of an agency's determination is based on the interpretation of a statute, this Court must consider the language of the statute as well as the legislative intent" (*Matter of Brookford, LLC v. N.Y. State Div. of Hous. & Community Renewal*, 31 N.Y.3d 679, 684–85, 82 N.Y.S.3d 788, 107 N.E.3d 1258 [2018]). "Although the proper interpretation of a statute ordinarily presents an issue of law reserved for the courts, this Court has recognized that '[a]n administrative agency's interpretation of [a] statute it is charged with implementing is entitled to varying degrees of judicial deference' " (*Matter of Greene [New York City Dept. of Personnel—Sweeney]*, 89 N.Y.2d 225, 231, 652 N.Y.S.2d 589, 652 N.Y.S.2d 589, 674 N.E.2d 1354 [1996], quoting *Matter of Rosen v. Public Empl. Relations Bd.*, 72 N.Y.2d 42, 47, 530 N.Y.S.2d 534, 526 N.E.2d 25 [1988]). "By contrast, where 'the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency' " (*id.*, quoting *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459, 426 N.Y.S.2d 454, 403 N.E.2d 159 [1980]).

The majority correctly states this appeal presents a question of statutory interpretation not subject to administrative deference, and that under the applicable standard of review we look to the plain language of the text, construing the law as a whole (majority op. at 523–524, 122 N.Y.S.3d at 211–12, 144 N.E.3d at 955–56). I also share the view that when the legislature has left a term undefined, we may look to dictionaries for guidance (majority op. at 525–526, 122 N.Y.S.3d at 212–14, 144 N.E.3d at 956–58). This ends my agreement with the majority analysis, for the text, legislative scheme ***534** and history require volitional behavior on the part of ****963 ***219** the inmate, and, therefore, the statute does not, as the majority concludes, encompass involuntary physical movement.

A.

"The primary consideration of courts in interpreting a statute is to 'ascertain and give effect to the intention of the Legislature' " (*Riley v. County of Broome*, 95 N.Y.2d 455, 463, 719 N.Y.S.2d 623, 742 N.E.2d 98 [2000], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 92[a], at 177). "[T]he plain meaning of the statutory text is the best evidence of legislative intent" (*People v. Cahill*, 2 N.Y.3d 14, 117, 777 N.Y.S.2d 332, 809 N.E.2d 561 [2003], citing *Riley*, 95 N.Y.2d at 463, 719 N.Y.S.2d 623, 742 N.E.2d 98). "In construing statutory provisions, the spirit and purpose of the statute and the objectives sought to be accomplished by the legislature must be borne in mind" (*Matter of Hogan v. Culkin*, 18 N.Y.2d 330, 335, 274 N.Y.S.2d 881, 221 N.E.2d 546 [1966]).

RSSL 607–c (a) provides, that

> "[a]ny [ ] correction officer [ ] who becomes physically or mentally incapacitated for the performance of duties as the natural and proximate result of an injury, sustained in the performance or discharge of [such officer's] duties by, or as the natural and proximate result of any act of any inmate or any person confined in an institution under the jurisdiction of such county, shall be paid a performance of duty disability retirement allowance."

Petitioner bears the burden of establishing the statutory requirements, including demonstrating that the incident in which she sustained her injuries was " 'the result of any act of any inmate' " (*Matter of Traxler v. DiNapoli*, 139 A.D.3d 1314, 1314, 32 N.Y.S.3d 383 [3d Dept. 2016] [internal citations omitted], quoting Retirement and Social Security Law § 607–c [a]).

The word "act" is not defined in the RSSL, but when the legislature adopted this word in the first round of POD benefits legislation, Black's Law Dictionary defined an "act" as something that "[d]enotes external manifestation of [an] actor's will" (Black's Law Dictionary 25 [6th ed 1990], citing to Restatement (Second) of Torts § 2).[1] The definition goes on to explain that ****964 ***220** "act" means "expression of ***535** will or purpose, carrying idea of performance; primarily that which is done or doing; exercise of power, or effect of which power exerted is cause; a performance; a deed. *In its most general sense, this noun signifies something done voluntarily by a person*" (*id.* [emphasis added]). Similarly, the Merriam–Webster Dictionary in circulation at the time, defined an act as "the doing of a thing" and "something done voluntarily" (Merriam–Webster Collegiate Dictionary 11 [10th ed 1996]). The current Eleventh Edition of Black's Law Dictionary generally retains this same definition (*see* Black's Law Dictionary 30 [11th ed. 2019] [defining an act as "(s)omething done or performed, esp(ecially) voluntarily" and "(t)he process of doing or performing; an occurrence that results from a person's will being exerted on the external world"]). Other current dictionary editions also define "act" as "something done voluntarily" (Merriam–Webster Dictionary Online, Act, available at https://www.merriam-webster.com/dictionary/act), "something that you do" (Cambridge Dictionary, Act, available at https://dictionary.cambridge.org/us/dictionary/english/act), and "a single thing that someone does" (MacMillan American English Dictionary, Act, available at https://www.macmillandictionary.com/us/dictionary/american/act_1). Thus, while "act" encompasses a broad range of conduct, contrary to the majority's view, ***536** the ordinary import of the term does not include that which by definition is excluded, namely nonvolitional or involuntary physical movement (majority op. at 525–526, 122 N.Y.S.3d at 211–12, 144 N.E.3d at 956–58).

It follows that the term "act," as used in RSSL 607–c, does not include conduct by actors who make no effort to exert their will on the world. The Sixth Edition of Black's Law Dictionary defines "voluntary" as, inter alia, "[u]nconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself" as well as "[d]one by design or intention" and "[p]roceeding from the free and unrestrained will of the person" (Black's Law Dictionary 1575 [6th ed. 1990]). The same edition defines "involuntary" as "[w]ithout will or power of choice; opposed to volition or desire" and states that "an involuntary act is that which is performed with constraint [q.v.] or with repugnance, or without the will to do it" (*id.* at 827). Similarly, the Eleventh Edition of Black's Law Dictionary defines "voluntary" as "[d]one by design or intention" (Black's Law Dictionary 1886 [11th ed. 2019] [giving "voluntary act" as an example]),[2] and defines "involuntary" as "[n]ot resulting from a free and unrestrained choice; not subject to control by the will" (*id.* at 991).[3] Thus, ****965 ***221** even if the word

"act" includes involuntary actions, this does not necessarily encompass nonvolitional actions, which are, simply put, unintended accidents. In other words, "involuntary acts" denote acts that lack free will, and can mean coerced yet conscious or intentional acts.

The majority assigns undeserved significance to the reference in the Seventh Edition of Black's Law Dictionary to the Model Penal Code, as no such reference existed in Black's Law ***537** Dictionary at the time the legislature adopted the phrase "act of an inmate." Regardless, as explained (*see* dissenting op. at 536 n. 2, 122 N.Y.S.3d at 220 n. 2, 144 N.E.3d at 964 n. 2), the Model Penal Code reference was added for nuance, not as the source for the commonly understood and leading definition of "act." Nor does the majority's reference to our State's Penal Code assist in resolving the definitional question presented by the RSSL, a civil statute. Although Penal Law §§ 15.00(1) and (2) distinguish between "act" as a "bodily movement" and "voluntary act" as "a bodily movement performed consciously as a result of effort or determination" (Penal Law §§ 15.00[1], [2]), we have "interpreted [the definition of "act" in section 15.00(1)] to mean the actus reus or 'wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability' " (*People v. McKnight*, 16 N.Y.3d 43, 48, 917 N.Y.S.2d 594, 942 N.E.2d 1019 [2010], quoting *People v. Rosas*, 8 N.Y.3d 493, 496 n. 2, 836 N.Y.S.2d 518, 868 N.E.2d 199 [2007] [other citation omitted]). Similarly, the definition of "act" in Model Penal Code § 1.13 is not "independently important" and is rather meant to have "influence upon the meaning of important Code provisions" (MPC Part I Commentaries, vol. 1, at 210). "[The definition's] validity is, therefore, best appraised in the specific context of the Code provisions where the term[ ] appear[s]" (*id.*). The definition of "act" and its accompanying distinctions contained in the Penal Law and the Model Penal Code must therefore be viewed in the particular context of criminal law, namely to distinguish between actus reus and mens rea. That distinction is wholly unrelated to our interpretation of a word contained in the RSSL, a civil pension benefit statute. Indeed, nothing in RSSL 607–c (a) or the statutory framework suggest that the legislature intended to align the meaning of the RSSL with terms as defined in the Penal Law.

B.

Apart from the absence of support for the majority's interpretation of the express language of RSSL 607–c, the statutory scheme further demonstrates the error in the majority's reasoning. "It is a well-settled principle of statutory construction that a statute or ordinance must be construed as a whole and that its various sections must be considered together and with reference to each other" (*People v. Mobil Oil Corp.*, 48 N.Y.2d 192, 199, 422 N.Y.S.2d 33, 397 N.E.2d 724 [1979] [internal citations ***538** omitted]). We have an "obligation to harmonize the various provisions of related statutes and to construe them in a way that renders them internally compatible" (*Matter of Aaron J.*, 80 N.Y.2d 402, 407–408, 590 N.Y.S.2d 843, 605 N.E.2d 330 [1992], citing *Mobil Oil Corp.*, 48 N.Y.2d at 199–200, 422 N.Y.S.2d 33, 397 N.E.2d 724; ****966 ***222** *Gaden v. Gaden*, 29 N.Y.2d 80, 86, 323 N.Y.S.2d 955, 272 N.E.2d 471 [1971]; McKinney's Cons Laws of NY, Book 1, Statutes §§ 97, 98). Further, "[a]ll parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof" (*People v. Pabon*, 28 N.Y.3d 147, 152, 42 N.Y.S.3d 659, 65 N.E.3d 688 [2016], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 98[a]; *see also, e.g.*, *People v. Williams*, 4 N.Y.3d 535, 538, 797 N.Y.S.2d 35, 829 N.E.2d 1203 [2005] [declining to treat a peace officer as an ordinary citizen in the arrest context because it would render the legislature's purposefully drawn differences in arrest powers as between the two meaningless]).

The legislature provided for a two-track disability scheme: (1) an ordinary disability retirement allowance under RSSL 605 available for members with 10 years of service or those who have suffered an accident without reference to years of service, which generally provides for 1/3 of the officer's final average salary; and (2) a performance-of-duty disability retirement allowance under RSSL 607–c which provides 75% of the member's final average salary, regardless of years of service.[4] Thus, we must interpret the statute in a manner that furthers the clear legislative intent to provide a more generous retirement allowance under RSSL 607–c for a particular class of incapacitation-causing events, to be distinguished from the circumstances permitting for ordinary disability benefits under RSSL 605 which, with exceptions not relevant here, are available after 10 years of service. The majority's interpretation undermines this legislative goal by expanding the scope of

POD benefits, injecting tension in a statutory scheme structured to provide ordinary disability benefits as a default, and enhanced POD benefits on a more limited basis (*see, e.g.*, ***539** Retirement and Social Security Law §§ 605, 607–c [b], 607–c [c]). Analyzing the word "act" in the context of the overall RSSL disability benefits scheme, wherein the legislature provided for varying sums of disability retirement allowances, lends further support to the conclusion that "act" is intended to mean only volitional conduct.

C.

Although I conclude that the word "act" as used in RSSL 607–c (a) may plainly be interpreted to refer solely to volitional conduct, the majority's view that the word unambiguously includes involuntary physical movement is based on a patchwork of secondary sources that are anything but clear. Even if "act" could be considered ambiguous in light of the terms of the statute and legislative scheme, any doubt as to the intended meaning of the word is put to rest by the legislative history of POD benefits, and makes clear that the legislature did not intend the enhanced pay benefit of RSSL 607–c (a) to apply when an officer is incapacitated from an inmate's nonvolitional conduct, as in this proceeding.

"In analyzing a statute [ ], courts look to [its] spirit and purpose, and the objectives of the enactors must be kept in mind" (*Matter of Albano v. Kirby*, 36 N.Y.2d 526, 530–531, 369 N.Y.S.2d 655, 330 N.E.2d 615 [1975], citing *Hogan*, 18 N.Y.2d at 335, 274 N.Y.S.2d 881, 221 N.E.2d 546). Of course, where there is ambiguity, "we may examine the statute's legislative history" (****967 ***223** *Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270, 286, 890 N.Y.S.2d 388, 918 N.E.2d 900 [2009], citing *Majewski v. Broadalbin–Perth Cent. School Dist.*, 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 696 N.E.2d 978 [1998]).

"These principles of statutory construction assume particular significance where ... the Legislature has spoken to an issue simultaneously in separate laws, sometimes cross-referencing them, and has repeatedly adopted and amended pertinent provisions piecemeal throughout decades" (*Matter of Sutka v. Conners*, 73 N.Y.2d 395, 403–404, 541 N.Y.S.2d 191, 538 N.E.2d 1012 [1989]). "Literal meanings of words are not to be adhered to or suffered to 'defeat the general purpose and manifest policy intended to be promoted' " (*Matter of Petterson v. Daystrom Corp.*, 17 N.Y.2d 32, 38, 268 N.Y.S.2d 1, 215 N.E.2d 329 [1966], quoting *People v. Ryan*, 274 N.Y. 149, 152, 8 N.E.2d 313 [1937] [other citations omitted]).

Section 607–c was passed in 1999 after two other provisions, RSSL 507–b and 507–c, were enacted to provide POD disability benefits to correctional officers. In 1996, RSSL 507–b was the first of the three bills passed. It provided POD disability retirement benefits to state correctional officers. The legislative ***540** history of that bill shows that the intent of the legislature was to provide benefits to officers "who become physically or mentally incapacitated as a result of an injury sustained in the performance or discharge of their official duties" (Mem. of State of N.Y. Executive Chamber, Bill Jacket, L. 1996, ch. 722, at 5). What prompted the passage of this legislation was the growth of the inmate population in state prisons, which resulted in "a system that [wa]s being operated at 133 percent of capacity" (Mem. of Support, Bill Jacket, L. 1996, ch. 722, at 4). The memorandum in support noted that "[t]he strain and tension created by this situation has manifested itself in an increase of altercations between inmates and between inmates and officers," leading "officers [to] have [ ] to retire because the injuries they sustained prevent them from performing the duties of the job" (*id.*). As the Governor's approval memorandum states, enhanced benefits were warranted because correctional officers "must come into daily contact with certain persons who are dangerous, profoundly anti-social, and who pose a serious threat to their health and safety" (Gov. Approval Mem. No 129, Bill Jacket, L. 1996, ch. 722, at 5).

Shortly thereafter, RSSL 507–c was passed in 1997 to provide POD disability benefits to New York City correctional officers, and RSSL 607–c soon followed in 1999 to cover county correctional officers. The language in RSSL 607–c (a) virtually mirrors the language in RSSL 507–b (a) and 507–c (a).[5]

"[T]he [l]egislature intended that [RSSL] 607–c provide the same benefits to county employees, who serve in the same capacity and face the same dangers resulting from increased altercations among inmates and between inmates and correction

officers, as those provided by [RSSL] 507–b" (*Matter of Parish v. DiNapoli*, 89 A.D.3d 1315, 1317, 934 N.Y.S.2d 516 [3d Dept. 2011], citing Senate Mem in Support, 1999 McKinney's Session Laws of NY, at 2015–2016; *see also Matter of Naughton v. DiNapoli*, 127 A.D.3d 137, 140–141, 4 N.Y.S.3d 740 [3d Dept. 2015] [using and comparing legislative history of sections 507–b and 607–c to determine if the legislature ***541** intended to cover certain ****968 ***224** injuries]). The legislative history for both these sections broadly shows an intent to extend the same benefits provided by RSSL 507–b to the relevant correctional officers in each corresponding bill. For example, RSSL 507–c was intended to provide disability retirement benefits to city correctional officers in recognition "that every correction member works, performs the same duties, and faces the same dangers and risks on a daily basis" and "granting [city] officers this benefit would remedy the present inequity [between state and city officers]" (Letter from Sen. Ceasar Trunzo, Bill Jacket, L. 1997, ch. 622, at 4). This expansion of benefits was necessary because city correction officers "work with dangerous inmates in a hostile work environment on a daily basis" (Letter from William Kwasnicki, Bill Jacket, L 1997, ch 622, at 14). Similarly, the Budget Report for RSSL 607–c directly stated that "[s]ponsors of the legislation claim that county ... correctional officers should be entitled to the same disability benefits as their counterparts in state service" and referenced the 1996 bill that passed section 507–b (Budget Report, Bill Jacket, L. 1999, ch. 639, at 6). Further, the Sponsor's justification for the bill acknowledged that correctional officers are "constantly exposed to violence, assault, transmissible disease and other life threatening situations" (Sponsor's Mem, Bill Jacket, L. 1999, ch. 639, at 4).

As the legislative history reveals, the legislature intended the enhanced POD disability benefit to address increased risks to correction officers due to their daily interactions with an inmate population the legislature viewed as dangerous and anti-social.[6] Put another way, the legislature provided a generous disability retirement benefit in recognition of the fact that correction officers work in an unsafe environment and may suffer career-ending injuries due to interactions with inmates.

The majority fails to persuade with its comparison to RSSL 607–c (f), which provides for POD benefits to officers employed in Westchester County for incapacitating injuries proximately caused by "an intentional or reckless act of any civilian visiting, or otherwise present at, ***542** an institution under the jurisdiction of such county" (Retirement and Social Security Law § 607–c [f]). The majority asserts that this section demonstrates that the legislature uses limiting language when it intends to narrow the meaning of "act" (majority op. at 526–527, 122 N.Y.S.3d at 213–14, 144 N.E.3d at 957–58). I agree, but the limiting language found in that section—"an intentional or reckless act"—only applies to volitional conduct, which is not the same as intentional conduct. Volitional conduct sometimes but not always intends the result while intentional conduct seeks to achieve a particular result. Thus, RSSL 607–c (f) does not support the majority's view, but instead confirms my interpretation of RSSL 607–c (a), because 607–c (f) presumes that the acts at issue are volitional.

Significantly, now, under the majority view, an inmate misstep may result in payment of POD benefits. This is not what the legislature intended. No less troubling, under the majority's definition, if an inmate faints and falls on a correction officer the fall would be an "act" that could serve as the basis for POD benefits (*cf.* ****969 ***225** *Matter of Laurino v. DiNapoli*, 132 A.D.3d 1057, 17 N.Y.S.3d 792 [3d Dept. 2015] [denying POD benefits to correctional officer injured while assisting an inmate who collapsed during a seizure because the legislature did not contemplate this situation as an "act of any inmate" falling within the meaning of section 507–b (a)]). The majority's interpretation is also in contravention of the legislative purpose to provide generous pension benefits because of the injuries attendant to dangers faced by correction officers in maintaining order among prisoners (*see* Sponsor's Mem, Bill Jacket, L. 1996, ch. 722, at 4 [justifying the necessity of POD benefits to compensate officers for the "increase of altercations between inmates and between inmates and officers"]; Letter from Danny Donohue, Bill Jacket, L 1990, ch 639, at 20 [supporting the passage of POD benefits because correctional officers "are charged with front line law enforcement and the supervision of prisoners in county jails and are constantly exposed to violence, assault, transmissible diseases and other life threatening situations"]; *see generally Laurino*, 132 A.D.3d 1057, 17 N.Y.S.3d 792).

In sum, the majority's interpretation is unsupported by the common understanding that an "act" is an "expression of will or purpose" (Black's Law Dictionary 25 [6th ed 1990]. Moreover, the majority fails to properly consider the legislative scheme, "the spirit and purpose" of the statute, and "the objectives of [its] enactors" (*Albano*, 36 N.Y.2d at 530–531, 369 N.Y.S.2d 655, 330 N.E.2d 615, citing ***543** *Hogan*, 18 N.Y.2d at 335, 274 N.Y.S.2d 881, 221 N.E.2d 546; *see also Riley*, 95 N.Y.2d at 463, 719 N.Y.S.2d 623, 742 N.E.2d 98, quoting McKinney's Cons Laws of NY, Book 1, Statutes § 92[a] at 177). The intended effect of the operation of the two-track disability benefits statutory scheme, as explained by the legislative history of RSSL 607–c, is to provide enhanced POD benefits to mitigate the effects of disabling injuries caused in an inherently dangerous prison environment. Thus, for purposes of RSSL 607–c POD benefits, an "act" means volitional conduct, not, as

the majority concludes, "any conduct originating from an inmate's internal processes, including volitional and nonvolitional movements" (majority op. at 527, 122 N.Y.S.3d at 214, 144 N.E.3d at 958).[7]

III.

Under the proper interpretation of RSSL 607–c (a) as I have described, it is readily apparent that petitioner failed to ****970 ***226** satisfy her burden to show her entitlement to POD benefits. According to the testimony from petitioner and her co-officer, the inmate was unable to stand and, therefore, fell as she attempted to descend from the vehicle due to her allegedly intoxicated or drug-induced condition. Section 607–c does not encompass injuries resulting from this type of inmate slip and fall, which was involuntary and in no way volitional. Indeed, the inmate did not manifest the type of dangerous, anti-social characteristics that lead to incapacitating ***544** injuries to correction officers that the legislature sought to mitigate with an RSSL 607–c (a) POD disability benefit.

I would affirm the Appellate Division because the Comptroller's decision is not irrational, or based on an erroneous determination of law, and there is record support for the Comptroller's conclusion that any disability was not the result of an act of an inmate within the meaning of RSSL 607–c (a).

Judges Fahey, Garcia and Wilson concur, Judge Wilson in a concurring opinion; Judge Rivera dissents in an opinion in which Chief Judge DiFiore and Judge Stein concur.

Judgment reversed, with costs, and matter remitted to the Appellate Division, Third Department, with directions to remand to respondents for further proceedings in accordance with the opinion herein.

All Citations

34 N.Y.3d 520, 144 N.E.3d 953, 122 N.Y.S.3d 209, 2019 N.Y. Slip Op. 08518

Footnotes

1 Each statute requires "an act of any inmate" or "any act of any inmate." It does not appear that the legislature distinguished between "an act" and "any act." Apart from this difference, the legislature incorporated the same language into each subsequent statute.

2 The Seventh Edition of Black's Law was published in 1999, the year section 607–c was enacted. The definition provided therein is the same as in the current, Eleventh Edition (Black's Law Dictionary [11th ed 2019], act). The dissent relies on the Sixth Edition, which, published in 1990, was the current edition when sections 63–a and 507–b were enacted, and defines an "act" as requiring the "actor's will" (dissenting op at 534–35, 122 N.Y.S.3d at 219–20, 144 N.E.3d at 963–64). But that definition cites to the definition in the Restatement (Second) of Torts, which differs from the commonly understood meaning of "act" because the Restatement definition is intended to ensure that tort liability be imposed only with respect to volitional acts (*see* Restatement [Second] of Torts § 2, Reporter's Note, Comment *a* ["some outward manifestation of the defendant's will is necessary to the existence of an act *which can subject him to liability*" (emphasis added)]). Moreover, as the dissent points out (dissenting op. at 536, 122 N.Y.S.3d at 220, 144 N.E.3d at 964), the Sixth Edition, in defining the word "involuntary," uses the term "involuntary act"—demonstrating that, even when the Sixth Edition was published, it was commonly understood that acts can be involuntary (Black's Law Dictionary 827 [6th ed 1990]).

[3] Penal Law § 15.00(2) defines "voluntary act" as "a bodily movement performed consciously as a result of effort or determination." Section 15.00(5) defines "to act" as "either to perform an act or to omit to perform an act."

[4] Contrary to the dissent's suggestion (dissenting op. at 537, 122 N.Y.S.3d at 221, 144 N.E.3d at 965), we are not saying that the Retirement and Social Security Law incorporates the Penal Law's definition of "act." The Penal Law definition nonetheless establishes that the legislature was aware of—and indeed drafted—a broad definition of the word "act."

[*] The consistent use of passive words in the legislative history also lends support to our belief that the legislature meant to provide benefits for inmates' nonvolitional acts. In addition to the use of the passive "come into contact with," rather than a more active phrase, the legislative history also relies on phrases like "exposed to" and "sustains" – language that conspicuously lacks the affirmative nature one would expect if the legislature intended to only include volitional acts of inmates.

[1] The majority's reliance on the Seventh Edition of Black's Law Dictionary as the relevant dictionary definition at the time section 607–c was enacted (majority op at 525–26, 525–26 n. 2, 122 N.Y.S.3d at 212–13, 212–13 n. 2, 144 N.E.3d at 956–57, 956–57 n. 2) is misplaced. RSSL 507–b and 507–c, on which 607–c was based, were passed in 1996 and 1997, respectively (*see infra*), in other words, prior to the publication of the Seventh Edition. The majority and I agree that the term "act" in these three RSSL sections carry the same meaning. Therefore, the relevant dictionary definition for purposes of analyzing RSSL 607–c is that which is provided in Black's Sixth Edition. The Sixth Edition's citation to the Restatement (Second) of Torts also does not change the definition offered from one encapsulating the commonly understood meaning of "act" to a specialized meaning only relevant in tort law. The citation to the Restatement (Second) of Torts follows only after the first definition of "[d]enotes external manifestation of actor's will" and not any other secondary or clarifying definitions and explanations afterwards (*see* Black's Law Dictionary 25 [6th ed 1990]). Furthermore, the definition of "act" goes on to define various specific acts in particular legal contexts, such as a "criminal act" or a "private act" (*see id.* at 25–26), suggesting that the main definition that I quote is meant to be the general and common understanding of the word "act." Regardless, as I discuss, the definition of "act" has continued to focus on the volitional nature of the conduct. It is irrelevant that the Sixth Edition, or any dictionary for that matter, defines "involuntary" or "fall" as an "act," as noted by the majority. Those definitions do not contemplate the will of the actor or the conduct, but rather describe the occurrence of the event itself. In this appeal, we must ascertain the definition intended by the legislature, which used the word "act" to mean some conduct on the part of inmates, not merely their presence at or the nonvolitional triggering of a particular incident.

[2] While the majority is correct that the Seventh and Eleventh Editions of Black's Law Dictionary quote the Model Penal Code's definition of "act," the inclusion of that quotation was new in the Seventh Edition. As the editors explain, such quotes are meant to "round out the treatment of various terms" and were picked due to their "temporal and geographic range, aptness, and insight" (Black's Law Dictionary x [7th ed 1999]). In the Eleventh Edition, the editors further clarified that "[m]ost quotations are included because they provide information or nuances that would not otherwise be available within the strict confines of a traditional definition" (Black's Law Dictionary xxxi [11th ed 2019]). Thus, the quotation to the Model Penal Code is best understood as illustrating an unfamiliar definition of the word "act," rather than its general, commonly understood meaning.

[3] As the majority acknowledges, the Seventh and Eleventh Editions of Black's Law Dictionary contain the same definitions (*see* Black's Law Dictionary 833, 1569 [7th ed 1999]) (majority op. at 525 n. 2, 122 N.Y.S.3d at 211–12 n. 2, 144 N.E.3d at 956–57 n. 2).

[4] POD benefits are reduced by any benefit payable under the Workers' Compensation Law (*see* RSSL 64[a]), but according to the State, POD benefits are still more favorable notwithstanding the reduction.

5 As the majority notes, the adoption in RSSL 507–b (a) and 507–c (a) of "an act of any inmate" rather than "any act of any inmate" as found in section 607–c is a difference without distinction for our purposes (majority op. at 525 n. 1, 122 N.Y.S.3d at 211 n. 1, 144 N.E.3d at 956 n. 1).

6 As this Court recognizes, "[c]orrection officers are tasked with the formidable and critical responsibility of protecting the safety of inmates and coworkers while maintaining order in correctional facilities" (*Rivera v. State of New York*, 34 N.Y.3d 383, 385, 119 N.Y.S.3d 749, 142 N.E.3d 641 [decided today], citing *Arteaga v. State*, 72 N.Y.2d 212, 217, 532 N.Y.S.2d 57, 527 N.E.2d 1194 [1988]).

7 The concurrence posits a strained interpretation of RSSL 607–c (a) as providing "two separate paths by which an officer may demonstrate the entitlement to recovery under the statute" (concurring op at 528, 122 N.Y.S.3d at 214, 144 N.E.3d at 958). On one hand, if correct, this reading removes the performance of duty requirement from path two and grants benefits for all injuries resulting from an act of an inmate, no matter if such injuries were not sustained in the performance of an officer's duties and ultimately defeating the purpose of POD benefits. On the other hand, if we assume that injury resulting from any act of any inmate can only be sustained in the performance of a correction officer's duties, this reading would render the distinction itself superfluous. If path one encompasses all disabling injuries caused by the conduct of an inmate and sustained by an officer while performing their duties, including injuries resulting from the nonvolitional acts of inmates, then there is no need for the second path of recovery for volitional acts because all disabling injuries are included within the first path. Moreover, if the legislature intended to provide an enhanced disability benefit to officers injured while working in a correctional environment and without regard to whether an inmate acted or not, as the concurrence suggests in its interpretation of the legislative history (*see* concurring op at 530-31, 122 N.Y.S.3d at 216-17, 144 N.E.3d at 960-61), the legislature simply would have omitted the phrase "any act of any inmate" and expressly allowed POD benefits to apply when an officer is injured in the performance of their duties.

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McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)
Article 17. Protecting the Elective Franchise (Refs & Annos)
Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)
McKinney's Election Law § 17-204

§ 17-204. Definitions

Effective: July 1, 2023

Currentness

For the purposes of this title:

1. "At-large" method of election means a method of electing members to the governing body of a political subdivision: (a) in which all of the voters of the entire political subdivision elect each of the members to the governing body; (b) in which the candidates are required to reside within given areas of the political subdivision and all of the voters of the entire political subdivision elect each of the members to the governing body; or (c) that combines at-large elections with district-based elections, unless the only member of the governing body of a political subdivision elected at-large holds exclusively executive responsibilities. For the purposes of this title, at-large method of election does not include ranked-choice voting, cumulative voting, and limited voting.

2. "District-based" method of election means a method of electing members to the governing body of a political subdivision using a districting or redistricting plan in which each member of the governing body resides within a district or ward that is a divisible part of the political subdivision and is elected only by voters residing within that district or ward, except for a member of the governing body that holds exclusively executive responsibilities.

3. "Alternative" method of election means a method of electing members to the governing body of a political subdivision using a method other than at-large or district-based, including, but not limited to, ranked-choice voting, cumulative voting, and limited voting.

4. "Political subdivision" means a geographic area of representation created for the provision of government services, including, but not limited to, a county, city, town, village, school district, or any other district organized pursuant to state or local law.

5. "Protected class" means a class of eligible voters who are members of a race, color, or language-minority group.

5-a. “Language minorities” or “language-minority group” means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

6. “Racially polarized voting” means voting in which there is a divergence in the candidate, political preferences, or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate.

7. “Federal voting rights act” means the federal Voting Rights Act of 1965, 52 U.S.C. § 10301 et seq., as amended.

8. The “civil rights bureau” means the civil rights bureau of the office of the attorney general.

9. “Government enforcement action” means a denial of administrative or judicial preclearance by the state or federal government, pending litigation filed by a federal or state entity, a final judgment or adjudication, a consent decree, or similar formal action.

10. “Deceptive or fraudulent device, contrivance, or communication” means one that contains false information pertaining to: (a) the time, place, and manner of any election; (b) the qualifications or restrictions on voter eligibility for such election; or (c) a statement of endorsement by any specifically named person, political party, or organization.

Credits

(Added L.2022, c. 226, § 4, eff. July 1, 2023.)

McKinney’s Election Law § 17-204, NY ELEC § 17-204
Current through L.2024, chapters 1 to 202. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)
Article 17. Protecting the Elective Franchise (Refs & Annos)
Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)
McKinney's Election Law § 17-206

§ 17-206. Prohibitions on voter disenfranchisement

Effective: July 1, 2023

Currentness

1. Prohibition against voter suppression. (a) No voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy shall be enacted or implemented by any board of elections or political subdivision in a manner that results in a denial or abridgement of the right of members of a protected class to vote.

(b) A violation of paragraph (a) of this subdivision shall be established upon a showing that, based on the totality of the circumstances, members of a protected class have less opportunity than the rest of the electorate to elect candidates of their choice or influence the outcome of elections.

2. Prohibition against vote dilution. (a) No board of elections or political subdivision shall use any method of election, having the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution.

(b) A violation of paragraph (a) of this subdivision shall be established upon a showing that a political subdivision:

(i) used an at-large method of election and either: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; or (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired; or

(ii) used a district-based or alternative method of election and that candidates or electoral choices preferred by members of the protected class would usually be defeated, and either: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; or (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired; or

(c) For the purposes of demonstrating that a violation of paragraph (a) of this subdivision has occurred, evidence shall be weighed and considered as follows: (i) elections conducted prior to the filing of an action pursuant to this subdivision are more probative than elections conducted after the filing of the action; (ii) evidence concerning elections for members of the governing body of the political subdivision are more probative than evidence concerning other elections; (iii) statistical evidence is more probative than non-statistical evidence; (iv) where there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision, members of each of those protected classes may be combined; (v) evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class is not required; (vi) evidence that voting patterns and election outcomes could be explained by factors other than racially polarized voting, including but not limited to partisanship, shall not be considered; (vii) evidence that sub-groups within a protected class have different voting patterns shall not be considered; (viii) evidence concerning whether members of a protected class are geographically compact or concentrated shall not be considered, but may be a factor in determining an appropriate remedy; and (ix) evidence concerning projected changes in population or demographics shall not be considered, but may be a factor, in determining an appropriate remedy.

3. In determining whether, under the totality of the circumstances, a violation of subdivision one or two of this section has occurred, factors that may be considered shall include, but not be limited to: (a) the history of discrimination in or affecting the political subdivision; (b) the extent to which members of the protected class have been elected to office in the political subdivision; (c) the use of any voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy that may enhance the dilutive effects of the election scheme; (d) denying eligible voters or candidates who are members of the protected class to processes determining which groups of candidates receive access to the ballot, financial support, or other support in a given election; (e) the extent to which members of the protected class contribute to political campaigns at lower rates; (f) the extent to which members of a protected class in the state or political subdivision vote at lower rates than other members of the electorate; (g) the extent to which members of the protected class are disadvantaged in areas including but not limited to education, employment, health, criminal justice, housing, land use, or environmental protection; (h) the extent to which members of the protected class are disadvantaged in other areas which may hinder their ability to participate effectively in the political process; (i) the use of overt or subtle racial appeals in political campaigns; (j) a significant lack of responsiveness on the part of elected officials to the particularized needs of members of the protected class; and (k) whether the political subdivision has a compelling policy justification that is substantiated and supported by evidence for adopting or maintaining the method of election or the voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy. Nothing in this subdivision shall preclude any additional factors from being considered, nor shall any specified number of factors be required in establishing that such a violation has occurred.

4. Standing. Any aggrieved person, organization whose membership includes aggrieved persons or members of a protected class, organization whose mission, in whole or in part, is to ensure voting access and such mission would be hindered by a violation of this section, or the attorney general may file an action against a political subdivision pursuant to this section in the supreme court of the county in which the political subdivision is located.

5. Remedies. (a) Upon a finding of a violation of any provision of this section, the court shall implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process, which may include, but shall not be limited to:

(i) a district-based method of election;

(ii) an alternative method of election;

(iii) new or revised districting or redistricting plans;

(iv) elimination of staggered elections so that all members of the governing body are elected on the same date;

(v) reasonably increasing the size of the governing body;

(vi) moving the dates of regular elections to be concurrent with the primary or general election dates for state, county, or city office as established in section eight of article three or section eight of article thirteen of the constitution, unless the budget in such political subdivision is subject to direct voter approval pursuant to part two of article five or article forty-one of the education law;

(vii) transferring authority for conducting the political subdivision's elections to the board of elections for the county in which the political subdivision is located;

(viii) additional voting hours or days;

(ix) additional polling locations;

(x) additional means of voting such as voting by mail;

(xi) ordering of special elections;

(xii) requiring expanded opportunities for voter registration;

(xiii) requiring additional voter education;

(xiv) modifying the election calendar;

(xv) the restoration or addition of persons to registration lists; or

(xvi) retaining jurisdiction for such period of time on a given matter as the court may deem appropriate, during which no redistricting plan shall be enforced unless and until the court finds that such plan does not have the purpose of diluting the right to vote on the basis of protected class membership, or in contravention of the voting guarantees set forth in this title, except that the court's finding shall not bar a subsequent action to enjoin enforcement of such redistricting plan.

(b) The court shall consider proposed remedies by any parties and interested non-parties, but shall not provide deference or priority to a proposed remedy offered by the political subdivision. The court shall have the power to require a political subdivision to implement remedies that are inconsistent with any other provision of law where such inconsistent provision of law would preclude the court from ordering an otherwise appropriate remedy in such matter.

6. Procedures for implementing new or revised districting or redistricting plans. The governing body of a political subdivision with the authority under this title and all applicable state and local laws to enact and implement a new method of election that would replace the political subdivision's at-large method of election with a district-based or alternative method of election, or enact and implement a new districting or redistricting plan, shall undertake each of the steps enumerated in this subdivision, if proposed subsequent to receipt of a NYVRA notification letter, as defined in subdivision seven of this section, or the filing of a claim pursuant to this title or the federal voting rights act.

(a) Before drawing a draft districting or redistricting plan or plans of the proposed boundaries of the districts, the political subdivision shall hold at least two public hearings over a period of no more than thirty days, at which the public is invited to provide input regarding the composition of the districts. Before these hearings, the political subdivision may conduct outreach to the public, including to non-English-speaking communities, to explain the districting or redistricting process and to encourage public participation.

(b) After all draft districting or redistricting plans are drawn, the political subdivision shall publish and make available for release at least one draft districting or redistricting plan and, if members of the governing body of the political subdivision would be elected in their districts at different times to provide for staggered terms of office, the potential sequence of such elections. The political subdivision shall also hold at least two additional hearings over a period of no more than forty-five days, at which the public shall be invited to provide input regarding the content of the draft districting or redistricting plan or plans and the proposed sequence of elections, if applicable. The draft districting or redistricting plan or plans shall be published at least seven days before consideration at a hearing. If the draft districting or redistricting plan or plans are revised at or following a hearing, the revised versions shall be published and made available to the public for at least seven days before being adopted.

(c) In determining the final sequence of the district elections conducted in a political subdivision in which members of the governing body will be elected at different times to provide for staggered terms of office, the governing body shall give special consideration to the purposes of this title, and it shall take into account the preferences expressed by members of the districts.

7. Notification requirement and safe harbor for judicial actions. Before commencing a judicial action against a political

subdivision under this section, a prospective plaintiff shall send by certified mail a written notice to the clerk of the political subdivision, or, if the political subdivision does not have a clerk, the governing body of the political subdivision, against which the action would be brought, asserting that the political subdivision may be in violation of this title. This written notice shall be referred to as a "NYVRA notification letter" in this title. For actions against a school district or any other political subdivision that holds elections governed by the education law, the prospective plaintiff shall also send by certified mail a copy of the NYVRA notification letter to the commissioner of education.

(a) A prospective plaintiff shall not commence a judicial action against a political subdivision under this section within fifty days of sending to the political subdivision a NYVRA notification letter.

(b) Before receiving a NYVRA notification letter, or within fifty days of mailing of a NYVRA notification letter, the governing body of a political subdivision may pass a resolution affirming: (i) the political subdivision's intention to enact and implement a remedy for a potential violation of this title; (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy; and (iii) a schedule for enacting and implementing such a remedy. Such a resolution shall be referred to as a "NYVRA resolution" in this title. If a political subdivision passes a NYVRA resolution, such political subdivision shall have ninety days after such passage to enact and implement such remedy, during which a prospective plaintiff shall not commence an action to enforce this section against the political subdivision. For actions against a school district, the commissioner of education may order the enactment of a NYVRA resolution pursuant to the commissioner's authority under section three hundred five of the education law.

(c) If the governing body of a political subdivision lacks the authority under this title or applicable state law or local laws to enact or implement a remedy identified in a NYVRA resolution, or fails to enact or implement a remedy identified in a NYVRA resolution, within ninety days after the passage of the NYVRA resolution, or if the political subdivision is a covered entity as defined under section 17-210 of this title, the governing body of the political subdivision shall undertake the steps enumerated in the following provisions:

(i) The governing body of the political subdivision may approve a proposed remedy that complies with this title and submit such a proposed remedy to the civil rights bureau. Such a submission shall be referred to as a "NYVRA proposal" in this title.

(ii) Prior to passing a NYVRA proposal, the political subdivision shall hold at least one public hearing, at which the public shall be invited to provide input regarding the NYVRA proposal. Before this hearing, the political subdivision may conduct outreach to the public, including to non-English-speaking communities, to encourage public participation.

(iii) Within forty-five days of receipt of a NYVRA proposal, the civil rights bureau shall grant or deny approval of the NYVRA proposal.

(iv) The civil rights bureau shall only grant approval to the NYVRA proposal if it concludes that: (A) the political subdivision may be in violation of this title; (B) the NYVRA proposal would remedy any potential violation of this title; (C) the NYVRA proposal is unlikely to violate the constitution or any federal law; (D) the NYVRA proposal would not diminish the ability of protected class members to participate in the political process and to elect their preferred candidates to office; and (E) implementation of the NYVRA proposal is feasible.

(v) If the civil rights bureau grants approval, the NYVRA proposal shall be enacted and implemented immediately, notwithstanding any other provision of law, including any other state or local law.

(vi) If the political subdivision is a covered entity as defined under section 17-210 of this title, the political subdivision shall not be required to obtain preclearance for the NYVRA proposal pursuant to such section upon approval of the NYVRA proposal by the civil rights bureau.

(vii) If the civil rights bureau denies approval, the NYVRA proposal shall not be enacted or implemented. The civil rights bureau shall explain the basis for such denial and may, in its discretion, make recommendations for an alternative remedy for which it would grant approval.

(viii) If the civil rights bureau does not respond, the NYVRA proposal shall not be enacted or implemented.

(d) A political subdivision that has passed a NYVRA resolution may enter into an agreement with the prospective plaintiff providing that such prospective plaintiff shall not commence an action pursuant to this section against the political subdivision for an additional ninety days. Such agreement shall include a requirement that either the political subdivision shall enact and implement a remedy that complies with this title or the political subdivision shall pass a NYVRA proposal and submit it to the civil rights bureau.

(e) If, pursuant to a process commenced by a NYVRA notification letter, a political subdivision enacts or implements a remedy or the civil rights bureau grants approval to a NYVRA proposal, a prospective plaintiff who sent the NYVRA notification letter may, within thirty days of the enactment or implementation of the remedy or approval of the NYVRA proposal, demand reimbursement for the cost of the work product generated to support the NYVRA notification letter. A prospective plaintiff shall make the demand in writing and shall substantiate the demand with financial documentation, such as a detailed invoice for demography services or for the analysis of voting patterns in the political subdivision. A political subdivision may request additional documentation if the provided documentation is insufficient to corroborate the claimed costs. A political subdivision shall reimburse a prospective plaintiff for reasonable costs claimed, or in an amount to which the parties mutually agree. The cumulative amount of reimbursements to all prospective plaintiffs, except for actions brought by the attorney general, shall not exceed forty-three thousand dollars, as adjusted annually to the consumer price index for all urban consumers, United States city average, as published by the United States department of labor. To the extent a prospective plaintiff who sent the NYVRA notification letter and a political subdivision are unable to come to a mutual agreement, either party may file a declaratory judgment action to obtain a clarification of rights.

(f) Notwithstanding the provisions of this subdivision, in the event that the first day for designating petitions for a political subdivision’s next regular election to select members of its governing board has begun or is scheduled to begin within thirty days, or in the event that a political subdivision is scheduled to conduct any election within one hundred twenty days, a plaintiff alleging any violation of this title may commence a judicial action against a political subdivision under this section, provided that the relief sought by such a plaintiff includes preliminary relief for that election. Prior to or concurrent with commencing such a judicial action, any such plaintiff shall also submit a NYVRA notification letter to the political subdivision. In the event that a judicial action commenced under this provision is withdrawn or dismissed for mootness

because the political subdivision has enacted or implemented a remedy or the civil rights bureau has granted approval of a NYVRA proposal pursuant to a process commenced by a NYVRA notification letter, any such plaintiff may only demand reimbursement pursuant to this subdivision.

8. Coalition claims permitted. Members of different protected classes may file an action jointly pursuant to this title in the event that they demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate.

Credits

(Added L.2022, c. 226, § 4, eff. July 1, 2023.)

McKinney's Election Law § 17-206, NY ELEC § 17-206
Current through L.2024, chapters 1 to 202. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)
Article 17. Protecting the Elective Franchise (Refs & Annos)
Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)
McKinney's Election Law § 17-218

§ 17-218. Attorneys' fees

Effective: July 1, 2023

Currentness

In any action to enforce any provision of this title, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, a reasonable attorneys' fee, litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs. A plaintiff will be deemed to have prevailed when, as a result of litigation, the defendant party yields much or all of the relief sought in the suit. Prevailing defendant parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

Credits

(Added L.2022, c. 226, § 4, eff. July 1, 2023.)

McKinney's Election Law § 17-218, NY ELEC § 17-218
Current through L.2024, chapters 1 to 202. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Town Law (Refs & Annos)
Chapter 62. Of the Consolidated Laws (Refs & Annos)
Article 4. Town Boards

McKinney's Town Law § 60

§ 60. Town board constituted

Effective: August 17, 2022

Currentness

1. In every town the supervisor and the town council members shall constitute the town board and shall be vested with all the powers of such a town and shall possess and exercise all the powers and be subject to all the duties now or hereafter imposed by law upon town boards and town boards of health within such towns; but it is not intended to extend the power of said boards or officers within the limits of any incorporated village or city, or in any manner to abridge or interfere with the power and authority of the officers of any such village or city within its corporate limits, except as otherwise provided by law.

2. In any town in which a town justice serves as a member of the town board, such town justice shall continue to serve as a member of the town board until the expiration of their term. Thereafter any town justice shall not be a member of the town board and a town council member shall be elected as a member of such town board in place of such town justice except as otherwise provided by the town board by resolution adopted pursuant to the provisions of section sixty-a of this article.

Credits

(Added L.1976, c. 739, § 2. Amended L.1981, c. 123, § 3; L.2022, c. 513, § 18, eff. Aug. 17, 2022.)

Notes of Decisions (9)

McKinney's Town Law § 60, NY TOWN § 60
Current through L.2024, chapters 1 to 202. Some statute sections may be more current, see credits for details.

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← POTENTIAL
Black's Law Dictionary (12th ed. 2024) (Approx. 1 page)

Document

Black's Law Dictionary (12th ed. 2024), potential

POTENTIAL

Bryan A. Garner, Editor in Chief

Preface to the Twelfth Edition | Guide to the Dictionary | Legal Maxims | Bibliography of Books Cited

potential *adj.* (14c) Capable of coming into being; possible if the necessary conditions exist <things having a potential existence may be the subject of mortgage, assignment, or sale>.

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NEW YORK STATE OF OPPORTUNITY.

Division of Local Government Services

Local Government Handbook

March 13, 2018

Andrew M. Cuomo, Governor
Rossana Rosado, Secretary of State

A Division of the New York State Department of State

COLLABORATORS			
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Contents

List of Figures

List of Tables

Foreword

Since 1975, the Local Government Handbook has provided a brief history and a comprehensive and authoritative overview of our local, state, and federal governments. Now in its seventh edition, this publication is an invaluable tool for citizens, municipal officials, teachers, students, and anyone who seeks to understand the complexity of state and local government.

New York State has a tradition of home rule authority and providing citizens with a strong voice in their local governments. In order to exercise that voice effectively, it is important to understand how our government and officials function at every level. The New York State Department of State Division of Local Government Services assists local citizens and local officials in providing effective and efficient services.

The Local Government Handbook was made possible through the efforts and contributions of experts working at all levels of state agencies. Their work on this important document is greatly appreciated.

Acknowledgments

The Department of State received generous assistance and information from many state entities in the preparation of this 7th Edition of the Local Government Handbook, including:

- Empire State Development
- Division of the Budget
- Legislative Commission on Rural Resources
- New York State Court of Appeals
- New York State Department of Civil Service
- New York State Department of Correctional Services
- New York State Department of Environmental Conservation
- New York State Department Education
- New York State Department of Transportation
- New York State Thruway Authority and Canal Corporation
- New York State Senate Research Service
- Office of the Speaker of the New York State Assembly
- Office of the State Comptroller
- Office of Real Property Services
- Office of Court Administration

Chapter 1

The Origins of Local Government and the Federal System

Local government in New York has evolved over centuries. The governmental forms created by the people reflect functional concerns and a sustained dedication to basic ideas of representative government.

Although we often speak of three "levels" of government, the United States Constitution mentions only two: the federal government and the state governments. The federal system, however, implicitly includes the idea that the states, in the exercise of powers reserved to them by the United States Constitution, would provide for local governments in ways that would take into account local diversities and needs. To the extent that the states have made such provisions in the form of state constitutional grants of home-rule power to the local units, such as in New York, local governments have become, in fact as well as theory, a third level of the federal system.

The experiences of the millions of people who have lived in this state have provided the raw materials for the creation of present-day social and governmental institutions. This chapter reviews some basic considerations that are relevant to the following questions:

- Why did New Yorkers of long ago create local governments?
- What types of governments did they establish?
- What did they believe about governmental power and its uses?
- How did the land, its climate and its diversities contribute to the shaping of governmental patterns?
- How did New Yorkers mesh their governmental patterns with those of the emerging nation?

1.1 The Heritage of History

A historian of county government will find that the familiar office of sheriff existed in England over one thousand years ago — as did the reeve (tax collector) of the shire or "shire-reeve." [1]

Long before early European settlers began to plan their particular forms of governmental organization in New York State, the Iroquois Confederacy existed as a sophisticated system of government. The Iroquois Confederacy

[1] Readers interested in the history of local government in New York will find informative the "Early History of Town Government" in McKinney's Town law, prepared in 1933 by Frank C. Moore. Moore later became Comptroller and Lieutenant Governor of New York, and his essay appeared in all subsequent editions of Mckinney's Town Law. Also of interest is the "History of the County Law," prepared by James S. Drake as an Introduction for the 1950 edition of McKinney's County Law.

included extensive intergovernmental cooperation and operated effectively from the mouth of the Mohawk River to the Genesee River. The Iroquois had found it advantageous to substitute intertribal warfare and strife for a cooperative arrangement in which each of the six tribes carried out assigned functions and duties on behalf of all. The federal arrangement in the United States Constitution was patterned after the Iroquois Confederacy. The familiar patterns of local government in New York today, however, stem largely from the colonial period.

1.1.1 Colonial Government in New York

Established by the Dutch, the first local governments in New York began as little more than adjuncts to a fur-trading enterprise. Under a charter from the government of the Netherlands, the Dutch West India Company ruled the colony of New Netherland from 1609 until the British seized it in 1664.

At first the Dutch concentrated almost wholly on commerce and trade, particularly the fur trade. As early as 1614 and 1615, they established trading posts at Fort Nassau, near the present Albany, and on Manhattan Island. Serious efforts to colonize began in 1624, when New Netherland became a province of the Dutch Republic. Beginning in 1629, the Dutch established feudal manors called "patroonships" to expedite the effort of permanent settlement. This system bestowed vast land grants upon individual "patroons," who were expected to populate their holdings with settlers who would then cultivate the lands on their behalf.

The Dutch rulers of New Netherland initially did not draw a sharp line between their overall colonial or provincial government and that of their major settlement, which was called New Amsterdam. It was not until 1646 that the Dutch West India Company granted what appears to have been certain municipal privileges to the "Village of Breuckelen" — lineal ancestor of the present-day Brooklyn — located across the East River from New Amsterdam. Fort Orange, which later became the City of Albany, obtained similar municipal privileges in 1662. In 1653 the "Merchants and Elders of the Community of New Amsterdam" won the right to establish what was called "a city government." This was the birth of the municipality which would later become New York City.

The Dutch colonial period lasted for more than 50 years. In 1664, during hostilities leading up to the second Anglo-Dutch War, Peter Stuyvesant, the last Dutch governor, surrendered New Netherland to James II of England, who came to be known as James, Duke of York. The British easily adapted the governments previously established by the Dutch to their own patterns and then further modified them to meet the needs of colonial New Yorkers.

Pressed to name a single source for the present pattern of local government in New York, a historian may cite a number of dates and places and argue that each has validity. However, the most prominent single event in the development of contemporary forms of local government in colonial New York was the "Convention" of delegates, which took place in 1665 at Hempstead, in what is now Nassau County. The purpose of the event was to propose laws for the colony which only the year before had passed from Dutch to British rule. The laws proposed by these delegates were adopted for the most part and came to be called the Duke of York's laws. They recognized the existence of 17 towns and created one county, called Yorkshire. Thus, the beginnings of town and county government in New York reflected colonial policies of the English government, certain Dutch patterns, and British colonial experience.

At a historic "General Assembly of Freeholders" convened in 1683 by Governor Thomas Dongan, participants passed a charter outlining the principles by which the colony ought to be governed. Known as the Charter of Liberties and Privileges, its principles were drawn from the Magna Carta and closely resembled our modern constitutions. Among other important actions, the Assembly divided the province of New York into 12 counties. The county became the basis of representation in the Colonial Assembly and also the unit of administration for the system of courts that was established at the same time. The charter was signed by the Duke of York and then vetoed by him five months later when he ascended to the throne as King James II. He abandoned the throne in 1688 and, in 1691, a new assembly elected under Governor Henry Sloughter passed new statutes reasserting the principles contained in the original charter.

The office of town supervisor also originated at this time in a directive to each town to elect a freeholder, to be called the "town treasurer," "to supervise and examine the publique and necessary charge of each respective

county." It is of interest to note that the original function of this office, called the "town supervisor" after 1703, was to allocate county expenses among the towns. County boards of supervisors and county legislatures developed from the meetings of the colonial town supervisors for the purpose of apportioning county expenses.

In 1686, the British Crown issued charters known as the "Dongan Charters" to the cities of New York and Albany. A century would pass before another city was chartered in New York. The City of Hudson received its charter in 1785 by an act of the State Legislature and thus became the first city to be chartered in the new United States.

It is apparent that many of the basic patterns, forms, and some of the practices of local government in the Empire State already existed at the time of the Revolution. The first State Constitution, which became effective in 1777, recognized counties, towns and cities as the only units of local government.

The village emerged as a fourth unit of local government in the 1790s through a series of legislative enactments granting recognition and powers to certain hamlets (see Chapter 8 [81]). This trend culminated in 1798, when the Legislature incorporated the villages of Troy and Lansingburgh. Neither now exists as a village; Lansingburgh was long ago absorbed into what has become the City of Troy.

1.2 Some Basic Beliefs

Local governments in the Empire State are more than merely products of four centuries of history; they also reflect basic beliefs and perceptions that are deeply held by past and present residents of the State.

There is a fundamental perception, widely shared among Americans, that although governmental power can be used to benefit the people, it can also be used to harm them. This awareness has fostered a firm conviction in New Yorkers that the people must not only promote the desirable uses of governmental power, they must also carefully protect themselves from the abuse of such power.

For this reason, many protective mechanisms have been put in place to hedge the constitutional and statutory provisions that authorize the use of power for specific purposes. These mechanisms are designed to assure that power will only be used for generally acceptable purposes and in ways which will not infringe unduly upon either the dignity or the established rights of the individuals, on whose behalf the power is presumed to be exercised.

Later chapters will identify and describe such protective measures as the judicial system, due process of law, certain constitutional protections, instruments of direct democracy (such as referenda, citizen boards and commissions), and other mechanisms of representative self government — all of which reflect a basic belief that we must subject governmental power to tight controls if we want to protect the people against tyranny, whether it is the tyranny of a king, a dictator or a political majority.

The people's strong attachment to representative government has greatly influenced the organization and operation of local government. The Charter of Liberties and Privileges (also known as "Dongan's Laws") declared in 1683 that the supreme legislative authority, in what was then the colony, "under his Majesty and Royal Highness should forever be and reside in a Governor, Council, and the people met in General Assembly." The Council and the Assembly, thus endowed with supreme legislative authority, constituted a bicameral (two-chambered) legislature in which at least the Assembly reflected a belief in representative government. In this particular case, representation was by counties. From the very earliest days, the forms of local government in New York have demonstrated the people's firm belief in representative government.

In addition, New Yorkers have always regarded government in a very practical way. Conceiving of governments as instruments to carry out duties and functions to meet specific needs, they created local governments to carry out particular activities. The Constitution, the statutes, and the charters of the cities, a few villages and some counties spell out these duties and functions.

Since New Yorkers have typically created local governments to meet generally recognized needs, it follows that they would see the forms, powers and operational arrangements of local governments as devices to accomplish

specific ends. Constitutional amendments, changes in state laws, and local legislative and administrative action have all facilitated the adjustment of form to function. Such measures have kept local governments responsive to the practical needs of the people they serve. Of course, it is not always easy to make such adjustments and later chapters will identify and describe tensions which develop when adjustments lag behind perceived needs.

1.2.1 The Land and the People

The functions of local governments reflect not only the history and beliefs of the people, but also their interests, how they go about the business of conducting their lives and the characteristics of their physical environment.

New York State encompasses an enormous variety of natural environments. While many local governments on Long Island are concerned with beach erosion and mass transit, those of the North Country often focus on such issues as winter recreation development and snow control.

New York State's location and geography has influenced the shaping of local government in several fundamental ways. Occupying a prominent position among the 13 original colonies, New York firmly held its position as the nation expanded over the centuries that followed. More than one-third of the battles of the American Revolution were fought in New York, including two decisive battles in the Town of Stillwater and the resulting British surrender at Saratoga, which collectively became the turning point of the war. In New York City, the Federal Union came into being in 1789.

From the start, New York has been the nation's most important roadway to its interior and its primary gateway from and to the rest of the world. The harbor of New York City and the waterways, railroads and highways of the state have provided the arteries over and through which a large portion of the nation's commerce has flowed. Airline route maps for the United States and the world illustrate the convergence of transportation in New York State and New York City. New York's natural resources and its people have maintained New York's standing as one of the nation's largest manufacturing states, and as the undisputed financial center of the nation.

If there is a single attribute that characterizes New York, it is diversity. Montauk Point at the eastern tip of Long Island, Rouses Point at the state's northeastern corner, and Bemus Point near the southwestern corner share little beyond their designation as "Points," and all abut bodies of water which are themselves diverse — the Atlantic Ocean, Lake Champlain and Chautauqua Lake, respectively.

1.2.2 The Land

New York has an area of 53,989 square miles, of which 6,765 square miles are water. Two masses of mountains — the Adirondacks and the Catskills — stand out in New York's topography, while Long Island, a 1,401-square-mile glacial terminal moraine, juts 118 miles into the Atlantic Ocean from the mouth of the Hudson River at the tip of Manhattan Island. New York is additionally unique in that its 75 miles of shoreline on Lake Erie, more than 200 miles on Lake Ontario and approximately 165 miles on the Atlantic shore make New York the only state that is both a Great Lakes state as well as an Eastern Seaboard state.

The waters of New York drain literally in all directions: southward to the Hudson, Delaware and Susquehanna Rivers; westward to Lake Erie; and northward to Lake Ontario and the St. Lawrence River. Also, a small part of the state's southwest corner lies in the Mississippi River watershed. Those New York waters drain eastward into the Allegheny River and onward into the Ohio River. The Ohio River empties into the Mississippi River, and ultimately, New York waters discharge into the Gulf of Mexico.

The rivers and waterways of New York greatly influenced the development of local government in the state. Settlement followed the waterways and hence river valleys saw the earliest local governments. Most prominent among the rivers, the Hudson is navigable by ocean-going vessels for nearly 150 miles inland to Albany. Also near Albany, the Mohawk River and the Erie Barge Canal extend westward from the Hudson River to form a water transportation route from eastern to western New York. In the southern tier region of the state the Susquehanna River, and

to some extent the Delaware River, provided waterways along which commerce, trade and settlement moved. In the northern and northwestern parts of the state, Lakes Erie, Ontario, and Champlain, as well as the St. Lawrence River provided additional avenues for development.

1.2.3 The Climate

Meteorologists describe the climate of New York State as "broadly representative of the humid continental type which prevails in the northeastern United States, but its diversity is not usually encountered within an area of comparable size." [2] This means that New York enjoys a climate of extremes — hot in the summer and cold in the winter.

Immediately east of Lake Erie, in the Great Lakes plain of western New York, and in those areas influenced by the Atlantic Ocean, such as Long Island, winter temperatures are often substantially more moderate. Long Island and New York City, for example, record below-zero temperatures in only two or three winters out of ten.

To understand the significance of this climatic diversity one need only glance at the average length of the frost-free season, which varies from 100 to 120 days in the Adirondacks, Catskills and higher elevations of the western plateau, to 180 to 200 days on Long Island. With its obvious implications for the agricultural and other economic interests of New Yorkers, the climate directly affects local government. In parts of the state that are referred to as "snowbelt" regions, the average yearly snowfalls exceed 90 inches. In these areas, local government must devote a major portion of its time and municipal budget to snow control on the highways and related challenges of highway maintenance.

1.2.4 The People

Nowhere is the essential diversity of New York more clearly demonstrated than in the ethnic and national origins of its people. From the earliest days of colonial settlement, the multiplicity of people coming to the great harbor at the mouth of the Hudson River nurtured the growth of the nation's largest city. Immigrants from all over the world flowed through the vast funnel of New York City. While many went on to populate the nation, others remained residents of the city or the state. The languages of the world continue to echo on the streets of Manhattan.

For 16 decades prior to 1970, more residents of the United States lived in New York than in any other state. After 1980, New York was supplanted by California as the most populous state Based on 2010 Census data, the New York population of 19,378,102 now ranks third to the California population of 37,253,956 and the Texas population of 25,145,561.[3]

The downstate counties — Nassau, Suffolk, Westchester and the five boroughs of New York City — account for over 61.7 percent of the state's population.

Table 1.1 [6] reveals the diverse sizes of New York's towns and villages. The largest number of towns and villages fall in the 500 to 2,499 population grouping. However, some New York villages have more than 25,000 people and some towns have populations over 50,000.

[2] Climate of New York, U.S. Department of Commerce, NOAA, "Climatography of the United States," No. 60, p.2.

[3] With a 2000 Census population of 18,976,457, New York now ranks third to California and Texas, which have 2000 Census populations of 33,871,648 and 20,851,820, respectively.

Table 1.1: Distribution of New York Towns and Villages by Population Category.[5]

Population	Towns Number	Towns Percent	Villages Number	Villages Percent
Up to 500	31	3.3	73	13.2
500 - 2,499	381	40.9	270	48.6
2,500 - 4,999	213	22.8	103	18.6
5,000 - 9,999	151	16.2	74	13.3
10,000 - 14,999	53	5.7	14	2.5
15,000 - 19,999	24	2.6	10	1.8
20,000 - 24,999	15	1.6	3	0.5
25,000 - 49,999	43	4.6	7	1.3
More than 50,000	21	2.3	1	0.2
Total	932	100	555*	100

Source: 2010 Census of the Population, courtesy of the Empire State Development.

- As of December 31, 2017 the number of villages were 536

These population statistics and those of Figure 1.1 [7] and Table 1.2 [7] reveal a great deal about local government activity. In some areas of the state, the local governments habitually deal with issues of expansion and growth. They must provide basic public services and amenities under conditions of rapid expansion, and somehow finance these activities. In other areas, local governments oversee static communities where little or no growth is taking place. A few areas face issues associated with contraction, where, for instance, excess school facilities are visible in communities with declining populations of school-age children.

[5] Source: 2010 Census of the Population, courtesy of the Empire State Development.

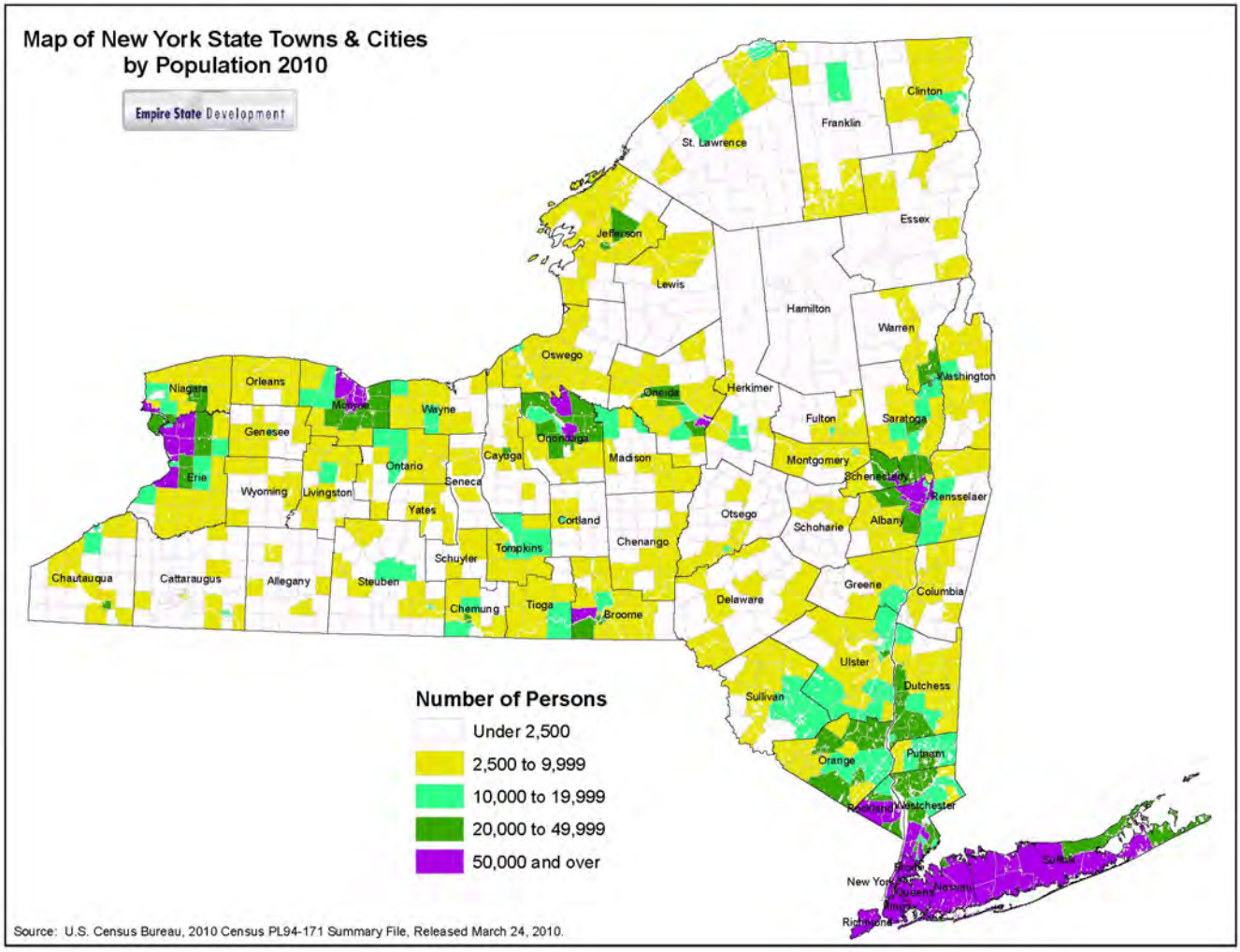

Figure 1.1: New York Counties with Population

Table 1.2: Population Change by Type of Municipality, 2000 - 2010. [7]

	2000	2010	Percent Change	Percent of Total Population
Towns [8]	8,692,132	8,958,225	3.1	46.2
Villages	1,871,947	1,905,581	1.8	9.83
Towns Outside of Villages	6,820,185	7,052,644	3.4	36.39
Cities other than NYC	2,265,897	2,235,187	-1.4	11.53
New York City [9]	8,008,686	8,175,133	2.1	42.19
American Indian Reservations	7,213	9,557	32.5	0.05
Total	18,976,811	19,378,102	2.1	100.0

1.2.5 The People's Interests

If government does indeed exist to serve the practical needs of the people, it follows that local governments should reflect the desires of the people and devote efforts to their concerns.

New Yorkers, like most people, are vitally concerned with issues related to making a living. Government at all levels has a role in maintaining an environment that is conducive to such pursuit. Accordingly, some basic economic statistics concerning New Yorkers are in order.

More than one-sixth of those employed in New York State work for federal, state or local government. Whether or not employees of local school districts are included, local governments employ far more people in New York State than the state and federal governments combined.

The total non-agricultural labor force of the state in October of 2011 was estimated at 8,727,000; a 176,400 job increase over October of 2001. Service industries, including wholesale and retail trade, financial, transportation and other services, lead the way with over 89 percent of the non-agricultural employment in New York State.

New York State agriculture is surprisingly diverse and vibrant. Agriculture is not only a vitally important element of New York's total economic life, it is often times the socio-economic backbone of New York's rural communities. The positive impact that New York State agriculture has on the local economic multiplier estimates far exceeds the local economic multipliers of many other employment sectors.[10] Agriculture also provides many valuable quality-of-life benefits such as open space, habitat protection, agri-tourism and recreational opportunities in the form of hunting, fishing and snowmobiling. In 2007, there were 36,350 farms in New York State, comprising 7.2 million acres of land or about 25 percent of the state's land area. The total value of agricultural products sold in 2007 was $4.4 billion dollars, which represents an increase of 51 percent over 1997 numbers, more than half of which was derived from dairy cattle and milk production.[11]

[7] SOURCE: 2010 Census of the Population, cited in the 2005 Annual Report, Office of the State Comptroller

[8] Includes villages.

[9] Includes the five boroughs of New York City.

[10] Policy Issues in Rural Land Use, Vol. 9, No. 2 December, 1996. Department of Agriculture, Resource and Managerial Economics-Cornell Cooperative Extension.

[11] New York State Agricultural Statistics 2005-2006 Annual Bulletin, printed and distributed by NYS Department of Agriculture and Markets.

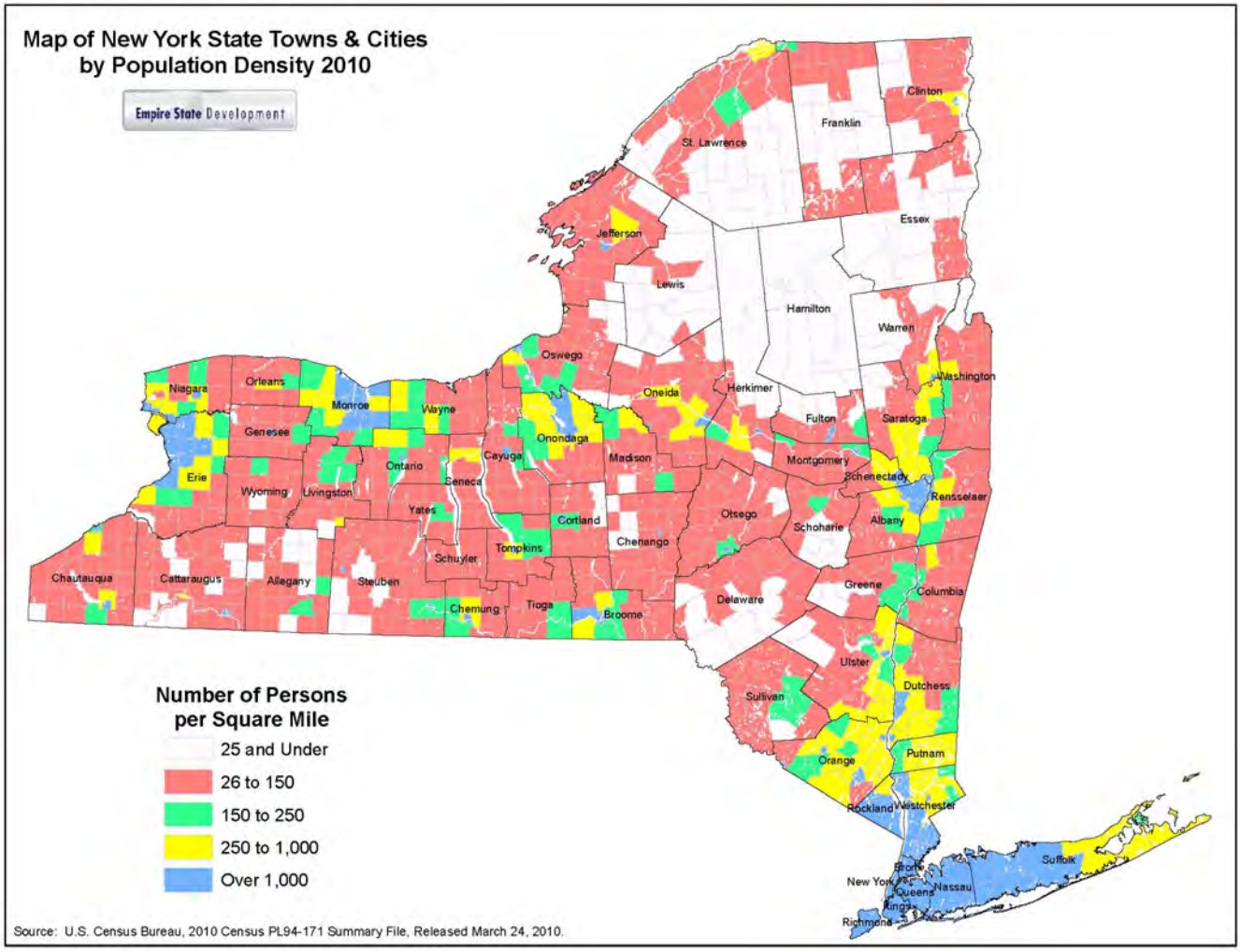

Figure 1.2: Map of New York Towns and Cities by Population Density

1.3 The Federal System

Among the factors that have influenced the nature and development of local government in New York, one of the most important has been the state's role as a member – a charter member – of the federal union called the United States. The state and its local governments are an integral element of the federal system.

At the time the people of the United States were creating the Federal Union in 1787-1789, they deeply feared great concentrations of governmental power. Accordingly, the United States Constitution established more than one principal center of sovereign power.

Although the United States Constitution does not mention local governments, the constitutional fathers were well aware of its existence and importance; it is clear that they saw it as a vital and continuing element of American life. The First Congress made the intention of the framers explicit in 1789 when it proposed the Tenth Amendment – all powers which were not delegated to the national government would rest with the states.

Among other reserved powers, the states were free to subdivide not only their territory, but also their powers, authority, and functional responsibilities, as they believed appropriate to their unique needs and requirements.

Accordingly, every state in its own way has provided for local governments and has endowed them with relatively independent authority to deal with issues that are regarded as local in nature. This has been done within limitations and according to applicable procedures set forth in the United States Constitution. The reapportionment of county legislative bodies to conform with the Equal Protection clause of the 14th Amendment (described in Chapter 5 [45]) provides a clear example.

When, as in New York, the people of a state have endowed their local governments with extensive home-rule authority through State Constitutional provisions, it is possible to regard the local government as a third level of the federal system. By delegation from the people of the state, the local government constitutes a third center of sovereign power, energy and creativity.

1.3.1 The Federal Idea

Local government in New York is more than a mechanical device or a set of legal formulas that channel political power toward specific objectives. It includes beliefs and values that reflect basic ideas and it embodies centuries of practical experience.

In 1789, the people of the several states were aware of and asserted their differences and diversities. If they were to accept a central government, it would have to recognize that the states would retain and exercise powers and decision-making authority in affairs of immediate and direct importance to the people in the places where they lived and worked. The American people still hold firmly to the idea of federalism. It operates both between the national government and the 50 state governments on the one hand, and between the individual states and their local governments on the other.

The federal system should not be viewed exclusively, however, as a means for limiting the concentration of power. It also permits the people to use power most effectively to deal with problems that are special and unique to different regions of such a highly diverse land.

By leaving the states free to organize and empower local government in response to the demands and needs of local areas, the constitutional framers gave a vast nation the capacity to achieve necessary unity without sacrificing useful diversity. Fostering the unity necessary to have a nation and giving free play to diversity at the same time is the essence of the federal system. Over two hundred years of American history demonstrate the suitability of local government for the nation as a whole, and for New York State in particular.

1.3.2 The National Government

A thorough description of the national government would comprise several lengthy books. Here are some fundamental facts:

First, the national government is a government of “restricted” powers. Over the years, presidential, congressional and judicial interpretations have found constitutional authority for adjusting and broadening the specific powers granted to the national government into functional areas that the framers could never have foreseen. Nonetheless, the Tenth Amendment of the United States Constitution, which reserves powers to the states, is still applicable.

Article 1, section 8 of the Constitution grants Congress the power “to regulate Commerce with foreign nations, and among the several states. . . .” Without formal amendment, this has sufficed to accomplish such diverse national purposes as the assurance of orderly air travel, electronic communication by radio, television and (potentially) the internet, and the maintenance of orderly labor-management relations in the nation’s industries.

Because the national powers alone cannot direct many areas of governmental activity efficiently or effectively, there has been a clarification — perhaps even a strengthening in some cases — of the roles of states and local governments in the federal system. We can see this, for instance, in some aspects of governmental action regarding environmental pollution. The national government has not been urged to assume the task of picking up solid

waste matter from the curbs in front of homes throughout the country. Nor is this an appropriate matter for the states. The duty to collect solid waste is, by general agreement, a function of local government.

What, then, should the national and state governments do in the area of solid waste management? The national government sets standards, conducts and finances research to develop new technologies for waste disposal, and provides financial assistance to utilize the new technologies to meet the standards. State governments match the research findings to their particular needs, develop specific regulations and operational procedures to meet the standards, devise optional organizational arrangements, and provide technical and financial assistance to local governments with issues related to solid waste management.

Collaborative governmental action can also best handle many other areas of public service.

1.3.3 The Role of the States and Local Government

The states have “residual” powers. In the words of the Tenth Amendment of the Constitution, the states have “the powers not delegated to the United States by the Constitution, nor prohibited by it....”

Some people assert that the states have “lost” power to the national government, as the latter has moved more and more into areas once regarded as the exclusive province of the states.

To some extent this may be true, but it is also true that state activity has grown. The situation is not so much one of relative gains or losses of power as it is of expanding governmental roles at all levels.

Recent experience shows that even as societal issues become nationwide in scope, they often retain state and local dimensions that make it desirable for the states and local governments to act in concert with the national government.

More and more, contemporary federalism has become a cooperative arrangement whereby national, state and local governments direct their energies toward common objectives. Consider the great highway network that now spans the nation. National, state and local governments all help to finance, build and maintain roads.

Any recent state or municipal budget includes a range of joint national-state-local actions that extends into familiar areas of modern life - public, health, social services, education, environmental pollution, and land-use planning. Local government officials increasingly find themselves cooperating in enterprises where they must coordinate their individual roles with officials who are similarly engaged at other levels of government.

1.3.4 The Contemporary Federal System

For more than a century and a half, people sought to clearly distinguish what the national government could do from what the states could do. The United States Supreme Court filled many shelves with learned discourses and decisions related to this purpose.

In recent decades, relationships within the federal system raise less questions of relative powers, and more questions regarding the portion of an overall governmental objective that each level of government can achieve. Since contemporary social problems have many facets and dimensions that cross governmental lines, it is no longer productive to view the federal system as an arena where antagonists contend for power. It is far more useful to consider which government can perform a given function, activity or duty and produce the best results.

The contemporary questions of federalism ask: how best to spread the costs of certain types of government programs among the tax-payers of the whole nation, how best to channel the dwindling natural resources of the nation to purposes of greatest benefit to all, how best to ensure that the powers of government are not used unfairly for the benefit of one segment of the society at the expense of others, and how best to ensure that citizens have a meaningful role in making decisions that are important to them.

In some ways the contemporary federal system operates in the way the framers envisaged. But we look at the system somewhat differently now than we did in the past. The root question of the national-state relationship has always been the extent to which the system would be centralized or decentralized. Today we often answer this question in terms of how much centralization or decentralization is necessary or desirable to meet agreed upon general objectives.

For local officials, one of the most significant attributes of the contemporary federal system is the array of federal financial grant programs that have been authorized by Congress, especially since World War II. The Catalog of Federal Domestic Assistance, https://www.cfda.gov/, available from the Superintendent of Documents, contains more than 1,000 separate federal aid programs. Many, though not all, are available to local governments. The fact that a program appears in the Catalog does not necessarily mean that funds are readily available. Making a federal grant program operational involves three necessary steps. Congress must enact legislation that "authorizes" a relatively large amount of money for the program. Congress must then appropriate all or part of the authorized amount — usually a considerably smaller figure than the full authorization. Finally, the President must release the appropriated funds through the federal budgetary control mechanisms for administration by the designated federal agency.

In recent years, many federal categorical assistance programs have been consolidated into block grants in response to demands for a simpler aid system and greater flexibility in state and local use of federal funds. Despite the continued consolidation of domestic assistance funding into block grants, the dollar amounts allocated to various programs have been continually reduced.

1.3.5 The Future of the Federal System

The resolution of public problems often requires a multi-pronged approach that the federal system not only makes possible, but facilitates. Many of our challenges can only be overcome by focusing the efforts of people at all levels. This belief has renewed the interest in various forms of decentralization, both of authority and of capacity to deal with specific problems. At the same time, it is realized that popular participation in community decision making should always be encouraged in an increasingly pluralistic society.

Proper functioning of the federal system requires citizen participation, continual patience and compromise, and toleration of diverse views and approaches. The federal system of government is far from perfect. However, its inclusion of checks and balances, diffusion of authority over several levels, and paramount respect for overarching constitutional principles, makes it the strongest bulwark against tyranny that has ever been seen in the world.

Chapter 2

The State Government

Government in New York State is essentially a partnership between the State and the local units of government — cities, towns and villages. All of the elements of the State government — the Legislature, the office of the Governor, the courts and the vast administrative structure — are engaged in activities for which the local governments also share responsibility. To understand local government fully, it is necessary to gain a basic understanding of the State government and its far-reaching activities.

Our federal system of government divides responsibilities between the national and state governments. The states, in turn, delegate much power to local governments. The entire system calls for fiscal and political accountability at each government level — from the White House to the village hall.

The interdependence and interrelationships among the Office of the Governor, the State Legislature, state agencies and the local governments are important to know. We must understand the grants of authority, the scope of jurisdiction, the organization and the operative processes of the executive, legislative, judicial and administrative elements of state government in relation to the other elements and to the local government function. The Governor makes policy and provides administrative leadership and direction; the Legislature also makes policy and implements it by enacting legislation and appropriating funds. State agencies carry out the actual programs of state government, and they act as intermediaries and close working partners with local governments. By providing a check and balance on the system, the courts also play an integral part in the operation of state and local government. We will discuss the courts in the following chapter.

2.1 The Legislature and the Legislative Process

The Constitution of the State of New York vests the lawmaking power of the state in the Legislature. It is a bicameral, or two-house, legislative body consisting of the Senate and the Assembly. Bicameralism in the United States today has two major roots: the English Parliament and the “Great Compromise,” which was advanced by the State of Connecticut at the Constitutional Convention of 1787. This compromise resulted in a Congress in which all states have equal representation in the Senate and representation roughly proportional to population in the House of Representatives.

2.1.1 Composition

Article III, section 2 of the State Constitution prescribes the number and terms of senators and assembly members. The number of senators varies, but there must be a minimum of 50. At present the Senate membership numbers

63.[1] Elected for two-year terms, its members are chosen from senatorial districts established by the Legislature.[2] The presiding officer is the Lieutenant Governor, who may not participate in debates and may vote only in the case of a tie. This tie-breaking vote applies only to organizational and procedural matters and may not be exercised on legislation since constitutionally no bill can become law "…except by the assent of a majority of the members elected to each branch of the legislature." [3] The Lieutenant Governor is not regarded as a member of the Senate. In the absence of the Lieutenant Governor, the presiding officer is the President pro tem, whom the Senate chooses from its own membership, or the President pro tem may designate another member to serve as presiding officer. When the presiding officer is a duly elected member of the body, he or she retains the right to vote on all matters.

The State Constitution specifies that the Assembly shall consist of 150 members chosen from single-member districts. Assembly members are elected simultaneously with senators for a term of two years. The presiding officer of the Assembly is the Speaker, who is elected by members of the Assembly.

2.1.2 Eligibility

Article III, section 7 of the State Constitution requires that legislators be citizens of the United States, state residents for at least five years, and residents of the district they represent for at least one year prior to their election. The Constitution does not specify a minimum age requirement for members of the Legislature, but the statutes provide that "No person shall be capable of holding a civil office who shall not, at the time he shall be chosen thereto, have attained the age of eighteen years." [4]

2.1.3 Compensation

Article III, section 6 of the State Constitution allows the Legislature itself, by statutory enactment, to establish rates of legislative compensation. Salary is paid on an annual basis and provision is made for reimbursement of expenses. Neither salary nor any other allowance can be altered during the legislative term in which it is enacted.

2.1.4 Dual Office Holding

The State Constitution bars legislators from accepting, during the term for which they are elected, a civil appointment from the Governor, the Governor and the Senate, the Legislature, or from any city government if the office is created or if its compensation is increased during the term for which the member has been elected.[5]

The Constitution also provides that a legislator elected to a congressional seat or accepting any paid civil or military office of the United States, New York State (except as a member of the National Guard, Naval Militia or Reserve Forces), or any city government shall vacate his legislative seat.

2.1.5 Internal Procedures

The State Constitution contains provisions regarding the general organization of the Legislature. Each house: determines its own rules; judges the elections, returns and qualifications of its members; chooses its own officers;

[1] State Law § 123.

[2] Please note that a concurrent resolution proposing an amendment to the State Constitution on legislative redistricting is now being considered. Article III, § 5-b is a proposed Constitutional Amendment that would authorize an Independent Redistricting Commission composed of 10 appointed members who would determine the district lines for congressional and state legislative offices. The proposal has been passed by the Legislature in 2012 by bill A.9526 and in 2013 by bill A.2086 and will become law if approved by vote of the people in November 2014.

[3] N.Y.S. Constitution, Article III, §14; see also Public Officers Law, §3.

[4] See N.Y.S. Constitution, Article VII; Public Officers Law, §3.

[5] N.Y.S. Constitution, Article III, § 7.

keeps and publishes a journal of its proceedings; and keeps its doors open except when the public welfare may require otherwise.

2.1.6 The Legislative Process

The Legislature convenes annually in regular session on the first Wednesday after the first Monday in January. The Legislature, or the Senate alone, may also be convened in special session at the call of the Governor or upon presentation to the Temporary President of the Senate and the Speaker of the Assembly of a petition signed by two-thirds of the members of each house of the Legislature.

2.1.6.1 Introduction of Bills

The introduction of a bill starts the formal legislative process. In general, members of the Legislature may introduce bills, which often appear simultaneously in both the Senate and the Assembly, beginning on the date the Legislature convenes. However, under Article VII of the State Constitution the Governor can introduce his Executive Budget bills without legislative sponsors. Bills may be presented for "prefiling" in the fall of an even numbered year for formal introduction when the Legislature convenes the following January, which will mark the start of a new two-year legislative term. Budget and appropriation bills that the Governor has submitted pursuant to section 3 of Article VII of the Constitution are delivered on or before the first day of February in each gubernatorial election year, and on or before the second Tuesday following the first day of the annual meeting of the legislature in all other years. The Temporary President designates the final day for unlimited introduction of bills in the Senate in each session. In the Assembly, the final day for unlimited introduction is the third Tuesday of May. After that date so designated in the Senate, and after the third Tuesday of May, each Member of the Assembly may introduce not more than ten bills. More than ten bills may be introduced after the final dates for introduction only by consent of the Temporary President of the Senate, or by the Committee on Rules of both of the respective houses.

2.1.6.2 Committees

The rules of each house provide for the establishment of standing committees to consider and make recommendations concerning bills assigned to the committees according to the subject matter, area affected or specific function to which the bills relate. A bill introduced in the Senate or Assembly is first referred to a standing committee unless, by unanimous consent, it advances without committee reference. A bill begins its course through the Legislature when a majority of the committee membership votes it out of committee.

2.1.6.3 Amendment

Bills may be amended an unlimited number of times. In either house the sponsor may amend and recommit a bill in committee, or the committee may report the bill with amendments. Either house may amend a bill even after it has passed in the other house.

The originating house must concur on amendments added by the second house and repass the bill as amended before it may be transmitted to the Governor. Each time a sponsor amends a bill, it adds a letter of the alphabet, beginning with "A," to the bill number. Either house may substitute, on a motion from the floor, an identical bill from the other house.

2.1.6.4 Action by the Governor

Ordinarily the Governor must sign a bill which has passed both houses of the Legislature before it becomes a law. While the Legislature is in session, the Governor has 10 days, excluding Sundays, to approve or veto a bill. If the Governor signs the bill, or does not take action within the 10 days, the bill becomes a law. If the Governor vetoes the bill, it dies unless it is repassed with the approval of two-thirds of the members of each house in which case it becomes a law notwithstanding the veto.

All bills passed or returned to the Governor during the last 10 days before the Legislature finally adjourns are treated as "30-day" bills. On such bills, the Governor has 30 calendar days, including Sundays, after the Legislature adjourns, within which to act. If the Governor does not act on a bill during the 30-day period, it does not becomes a law, but is deemed vetoed. Such bills are said to have been "pocket vetoed", since the Governor is not required to act upon them and does not have to give reasons for his or her failure to act.

2.1.7 Constitutional Amendments

A concurrent resolution proposing an amendment to the State Constitution is considered by the Legislature in the same manner as a bill. The Legislature must, however, transmit the proposed amendment to the Attorney General for an opinion as to its possible effect upon other provisions of the Constitution. The Attorney General must return the proposal within 20 days. Failure of the Attorney General to render an opinion does not affect the proposal or action thereon. If adopted by both houses, it is sent to the Secretary of State for filing and publication prior to the election of a new Legislature. No action by the Governor is required. The proposal must again be submitted to the next succeeding Legislature. If adopted a second time, it is submitted to the people for consideration and vote. If approved, it becomes part of the Constitution as of the following January first.

A concurrent resolution ratifying a proposed amendment to the United States Constitution is treated in the same manner as a bill. If adopted by the Legislature, the resolution is delivered to the New York State Secretary of State, who forwards it to the United States General Services Administration.

2.1.8 Sources of Legislation

A characteristic of our relatively open society in the United States is that an idea for legislation, and indeed a bill itself, may originate from almost any source. Sources of legislative proposals include the Governor's annual legislative program, the legislative programs of the various state departments, individual legislators, special interest groups, municipal associations, local governments, individual citizens and various committees of the Legislature.

2.1.9 Legislation — Local Government Role

The legislative process provides local officials and the public with the opportunity to express their views on pending legislation to the Legislature and the Governor. Individuals can have an impact on legislation; it does not take an accomplished lobbyist to point out to legislators and legislative leaders the advantages or deficiencies of a particular bill. Officials and citizens alike should not be dissuaded from making their views known merely because they are unfamiliar with the legislative process. Local officials can turn to their municipal associations for guidance on legislative matters, and citizens have the opportunity to work with an array of public and special interest groups.

In many cases, the task of making one's views known may begin before specific legislation has been introduced. Legislative commissions and committees frequently hold public hearings on particular problems at which the views of public officials and citizens are sought. Also, individual legislators often actively seek out the views of their constituents as to needed legislation.

The time to make one's views known about a particular bill is while it is under consideration by the Legislature, particularly while the bill is in committee. Written comments given to the committee's chairperson, with sufficient copies for committee members and staff, will help accomplish this purpose.

After a bill is reported out of committee, getting an opinion across may be increasingly difficult, because, if for no other reason, a vast number of bills come before each house. At this point it is best to direct comments to the leaders of each house. Anyone wishing to express views on a bill should remember that even after a bill has passed one house prior to becoming law, the other house must consider it, first in committee and then on the floor. After a bill has passed both houses, comments should be directed to the Governor or his or her Counsel. Here, again, time is of the essence. If passed early in the session, the Governor has 10 days from the time the bill is delivered to him or her in which to sign or veto it.

In the Assembly, the news media and the public are provided access to all standing committee meetings. The committee chairpersons have the option to close meetings or hold executive sessions in accordance with the Open Meetings Law, but roll call votes must be available to the press and to the public as soon as practicable. The public may also check committee attendance records. The Assembly public information office provides the public with a variety of materials relating to standing committees (schedules of meetings, hearings, etc.), sponsor's memoranda on bills, transcripts of debates, daily calendars and other relevant information. The Assembly also maintains a website.

The Senate rules require a great deal of transparency about actions taken by the Senate, its members and its committees. These rules provide that all committee meetings must be open to the news media and the public. Additionally the committee meetings are webcast and archived (available after the meeting is over) on the Senate Standing Committee website (although committee chairpersons may call special closed meetings in accordance with the Open Meetings Law). The rules also provide that agendas for committee meetings must be made available to the news media and to the public, the Thursday prior to the meeting and provide that standing committees must serve all year. The Senate Journal Clerk's office provides, or helps the public to obtain, materials similar to those available from the Assembly Public Information Office. The Senate also maintains a website, which has public information about bills introduced, committee actions, and provides access to all hearings, roundtables, committee meetings and reports and information of interest to the public. Both houses provide a telephone "hotline" service during sessions, from which anyone can obtain information on the current status of any bill.

2.2 The Governor

The Governor is the central figure in the State's public affairs. The Governor initiates programs and executes them; guides the Legislature; appoints and removes key officials; and represents the state and its people. The Governor has a very strong role in the State of New York, since the office includes policy development, legislative leadership, executive control and sovereign responsibilities.

2.2.1 Policy Development

The policymaking role derives from the Governor's responsibilities and position as chief executive officer of the state. The role of chief policymaker is therefore more implied than explicitly stated in either the State Constitution or other state laws. As the state's activities have grown, the Governor's concerns have become broader. Today they include economic and community development, transportation, education, environmental conservation, health, criminal justice, drug abuse, housing and other matters affecting daily life. The people look to the Governor for leadership and direction in these areas, but the Constitution does not explicitly vest the office with such powers. The Constitution mandates that the Governor annually present a "State of the State" message and an executive budget to the Legislature.[6]

[6] N.Y.S. Constitution, Article IV, § 3.

2.2.2 Legislative Leadership

Legislative authority is often required to implement executive policy proposals. To achieve implementation, the Governor has substantial constitutional, statutory and other less-formal resources. The Governor not only has influence with legislators and with the public, but he or she also has constitutional authority to convene and specify the agenda of special legislative sessions. Via messages of necessity, the Governor also has the power to clear bills for consideration. With those powers, the Governor has a key role in establishing the agenda for decision making and in shaping those decisions. The Governor serves as a public leader as well as the chief administrator of the State of New York.

2.2.3 Executive Control

The State Constitution provides that "the executive power shall be vested in the Governor," who "shall take care that the laws are faithfully executed." [7] The Constitution also empowers the Governor to appoint and remove the heads of most state agencies and to propose the budget. These provisions form the basis for gubernatorial direction of state activities.

The executive budget is perhaps the strongest managerial tool that the Constitution provides the Governor. Since 1927, Article VII of the New York Constitution has conferred on the Governor initial responsibility for proposing to the Legislature a coherent statewide plan for government spending. Under this system, the State's budget originated with the Governor, and he or she must submit to the Legislature proposed legislation, including "appropriation bills," to put his or her proposed budget into effect. The Legislature may not alter an appropriation bill the Governor has submitted, except to strike out or reduce items. The Legislature may, however, add items of appropriation, provided that each such item is stated separately and distinctly from the original items and that each refer to a single object or purpose. "Such an appropriation bill shall when passed by both houses be a law immediately without further action by the governor, except that separate items added to the governor's bills by the legislature shall be subject to [the governor's line-item veto]." Gubernatorial direction over administrative agencies centers in the Division of the Budget, which both recommends to the Governor how much state agencies should be allowed in appropriations, and exercises considerable authority over how agencies spend the funds appropriated by the Legislature. The Governor's specific constitutional powers for administrative control, however, are not extensive and do not include complete administrative and managerial powers. Constitutionally, the Governor does not control the entire executive branch. Both the State Comptroller and the Attorney General are popularly elected, and the Legislature chooses the Regents of the University of the State of New York, who supervise the Education Department. The Governor primarily concentrates on policy, and focuses gubernatorial administrative attention on overall direction.

2.2.4 Sovereign Responsibilities

The Governor has power to grant reprieves, commutations and pardons after conviction for all offenses except treason or in cases of impeachment. The Governor also may remove certain local officials, particularly those concerned with law enforcement, and may appoint certain judges and local officials to complete terms in some cases and to fill vacancies pending election in others. Finally, the Governor is commander-in-chief of the state's military and naval forces.

2.2.5 Eligibility

The Governor must be a citizen of the United States, not less than 30 years old, and must have resided in the state for at least five years at the time of election.

[7] N.Y.S. Constitution, Article III, §2; see also Public Officers Law, §3.

2.2.6 Succession

If the Governor dies, resigns or is removed from office, the Lieutenant Governor becomes Governor and, upon succession to the office, the Governor may fill the vacancy created in the office of Lieutenant Governor by appointment.[8] If the Governor is absent from the state, under impeachment, or is otherwise unable to discharge the duties of the office, the Lieutenant Governor acts as Governor until the inability ceases. The Temporary President of the Senate and the Speaker of the Assembly are next in the line of succession, respectively.

2.3 Lieutenant Governor

The Constitution assigns the Lieutenant Governor only the role of serving as President of the Senate. The Governor and the Legislature may, however, make other assignments, and traditionally Governors have turned to the Lieutenant Governor for various kinds of help, ceremonial and otherwise.

2.4 State Comptroller

The State Comptroller is the state's chief fiscal officer. The Office of the State Comptroller: maintains accounts and makes payments on behalf of the State; audits the finances and management of state agencies, New York City and public authorities; examines the fiscal affairs of local governments; provides fiscal legal advice to both state agencies and local governments; trains local officials in fiscal matters; and administers the State's retirement systems. The State Comptroller's Office publishes a wide range of materials on fiscal matters, including annual reports on state and local government finances, as well as an annual volume of legal opinions on local government operations.

2.5 Attorney General

The Attorney General is the state's chief legal officer. The Office of the Attorney General prosecutes and defends actions and proceedings for and against the state, and defends the constitutionality of state law. Local government legal officers may obtain informal, written Opinions from the Attorney General. These Opinions, while not binding on the local government, are nonetheless extremely useful, and are given great weight by the courts. The Attorney General's responsibilities also include supervising the Organized Crime Task Force; protecting consumers against fraud; safeguarding civil rights and the rights of workers; the condemning property; and collecting debts. Specialized bureaus handle: criminal prosecutions, antitrust cases, investor protection, environmental protection, consumer fraud and protection, civil rights, worker protection, regulation of cooperative and condominium housing, charities, and trusts and estate matters.

2.6 State Agencies

The State Constitution provides that there shall be no more than 20 civil departments in the state government. These departments previously were specified by name, but the Constitution was amended in 1961 to eliminate the specification of departments and to set the maximum number of departments at 20.

The Legislature is authorized by law to assign new powers and functions to departments, offices, boards, commissions or executive offices of the Governor, and to increase, modify or diminish such powers and functions. The

[8] See Skelos v. Paterson, 13 N.Y.3d 141 (N.Y. 2009).

Legislature is further authorized to create temporary commissions for special purposes or executive "offices" in the Executive Department. Numerous state agencies fall into the latter two categories — that is, temporary commissions and "offices" in the Executive Department. Generally speaking, the heads of all departments, boards and commissions (except the State Comptroller, Attorney General and the members of the Board of Regents) must be appointed by the Governor with the advice and consent of the Senate, and may be removed by the Governor in a manner prescribed by law. Another exception involves the authority of the Board of Regents to appoint and remove the Commissioner of Education.

A final exception is the Commissioner of the Department of Agriculture and Markets. The Constitution provides that this department head shall be appointed as provided by law, which presently provides for the Governor to make this appointment, by and with the advice and consent of the Senate.[9] While this manner of appointment is consistent with the general manner of appointment of department heads, the Governor's appointment power is statutory rather than constitutional.

The administrative structure of New York State government currently consists of 20 state departments and a great number of other agencies, such as public authorities, temporary state commissions, and various divisions and offices in the Executive Department. Each department and agency has been established for a particular purpose, and each functions in a particular way and within a legally prescribed area of operation. Each department directly or indirectly affects local governments of the state in terms of jurisdictional or regulatory authority, advisory services, aid programs and other related functions, depending on its program responsibilities.

Some state agencies were created in response to federal mandates requiring that a particular type of statewide agency handle a particular program. Pressures from within the state for new agencies to furnish specialized services led to the establishment of other agencies. The relationships between these agencies and local governments in the provision of public services are discussed Chapter 15 [163].

[9] N.Y.S. Agriculture and Markets Law § 5.

Chapter 3

The Judicial System

The State Constitution establishes a unified court system for New York State. All courts, except those of towns and villages, are financed by the state in a single court budget. Administration of the courts is the responsibility of a single administrator, having statewide authority, who acts in accordance with policy direction supplied by the Chief Judge of the Court of Appeals.

The courts that compose the state's judicial system generally may be arranged on three functional levels: (1) appellate courts, including the Court of Appeals and the Appellate Divisions of Supreme Court; (2) trial courts of superior jurisdiction, including the Supreme Court and various county level courts; and (3) trial courts of inferior jurisdiction, including the New York City civil and criminal courts and various district, city, town and village courts upstate.

The court system in New York is one of the three separate branches of state government (Executive, Legislative and Judicial), it plays an integral role in both state and local governmental operations. The courts are charged with: interpreting provisions of the State Constitution and laws enacted by state and local governments; resolving disputes between private citizens or between a private citizen and a state agency; exercising jurisdiction over persons accused of crimes and other violations of law; and adjudicating claims of individuals against state and local governments.

In 1962, New York made its first court reorganization in more than a century by completely revising the judiciary article of the State Constitution (Article VI). This new article continued or established the various courts that now comprise the New York court system. It also prescribed the number of judges and justices for each of these courts, their method of selection, and their terms of office (see Table 3.1 [22]). The new article also created an administrative structure responsible for administering the courts and for disciplining judges.

In November 1977, the people of the state approved a series of amendments to the judiciary article that: (1) changed the manner in which Judges of the Court of Appeals are selected from statewide popular election to gubernatorial appointment; (2) established a new, centralized system of court administration; and (3) streamlined procedures for disciplining judges. These amendments took effect on April 1, 1978.

Of great importance to the operation of the court system was the 1976 enactment by the State Legislature of a unified court budget for all courts of the unified court system, except town and village courts. Whereas formerly both state and local government sources had funded the affected courts in over 120 different court budgets, effective April 1, 1977, the state funded them entirely in a single court budget.

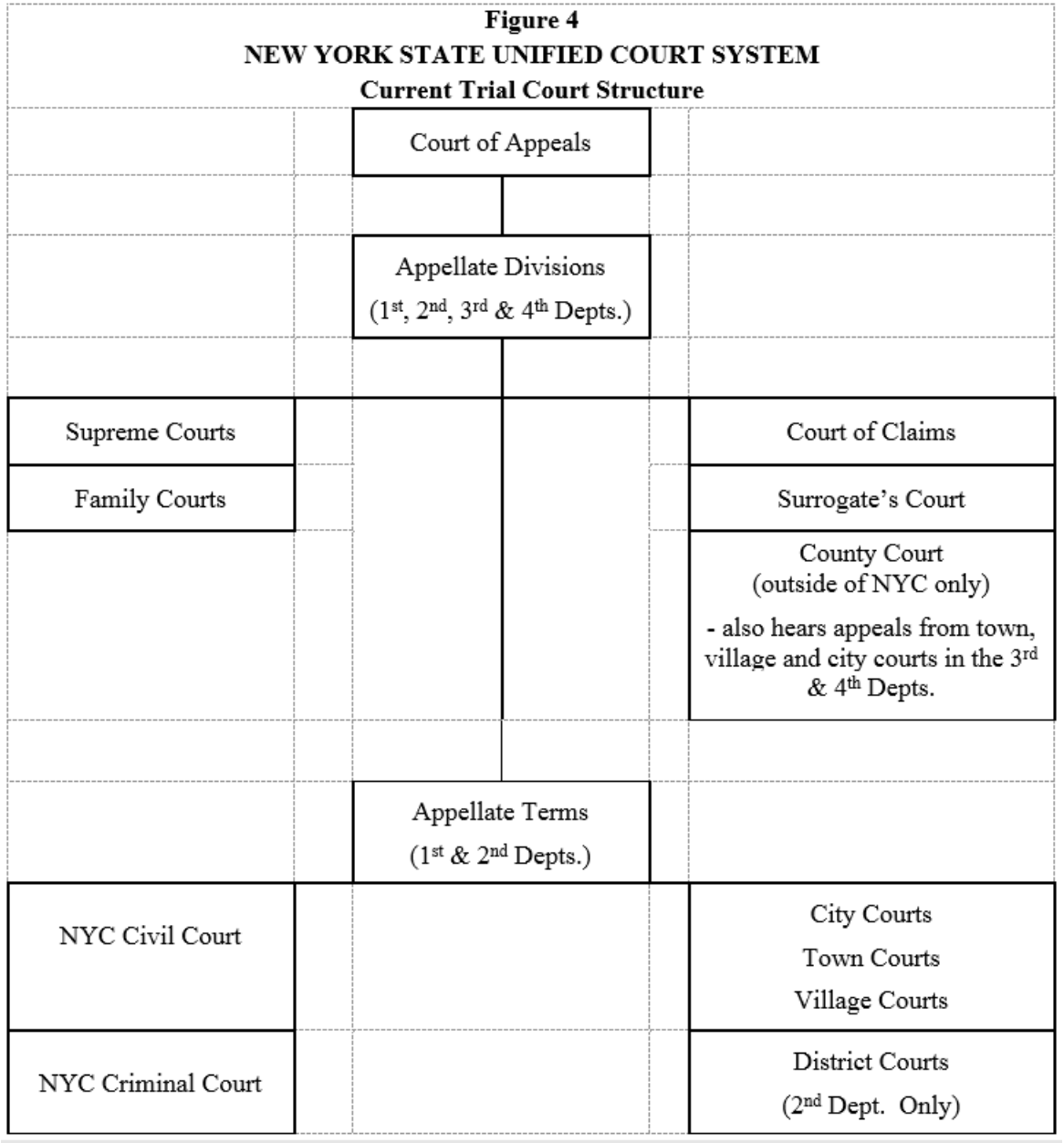

Figure 3.1: New York State Unified Court System Current Trial Court Structure

Table 3.1: New York State Court System Characteristics [1]

Court	Number of Judges	How Selected	Terms
Court of Appeals	7	Gubernatorial appointment with advice and consent of Senate upon recommendation of a commission on judicial nomination	14 years

Table 3.1: (continued)

Court	Number of Judges	How Selected	Terms
Appellate Division	24 permanent; more temporary	Gubernatorial designation from among duly elected Supreme Court justices Court justices	Presiding justice: 14 years, or balance of term as Supreme Court justice Associate justice (permanent): 5 years or balance of term as Supreme Court justice
Appellate Term	Varies	Designated by Chief Administrator of Courts, with approval of presiding justice of the Department, from among duly elected Supreme Court justices	Varies
Supreme Court	328[2]	Elected	14 years
Court of Claims	26	Gubernatorial appointment with advice and consent of Senate	9 years or, if appointed to fill a vacancy, the period remaining in that term
Surrogate's Court	31[3]	Elected	14 years in New York City 10 years outside the City
County Court	129[4]	Elected	10 years
Family Court	127	Mayoral appointment in New York City. Elected outside the City	10 years or, if appointed to fill a vacancy, the period remaining in that term
Civil Court of New York City	120	Elected	10 years
Criminal Court of New York City	107	Mayoral appointment	10 years or, if appointed to fill a vacancy, the period remaining in that term
District Court	50	Elected	6 years
City Court	162	Most elected, some appointed by Mayor of Common Council	Varies
Town Court	Approx. 2,000	Elected	4 years
Village Court	Approx. 570	Elected	Varies; most are 4 years

3.1 Court of Appeals

Established in 1846, the New York Court of Appeals has emerged as a great common law court at the apex of the state court system.

[1]Mandatory retirement at end of year in which Judge reaches age 70, with limited potential exceptions for Supreme, Appellate and Court of Appeals justices.

[2]Includes justices designated to the Appellate Division and Terms. Does not include certified justices of the Supreme Court (which number may vary significantly each year).

[3]Includes only separately elected surrogates.

[4]Includes 72 county judges and 57 multi-hatted county-level judgeships.

In civil cases, appeals may be taken as of right or by permission, depending on the finality of the determination from which an appeal is sought, the issues involved, the court in which the action or proceeding originated, and whether there was disagreement in the court below.

The Court of Appeals consists of a Chief Judge and six Associate Judges. Each judge serves a term of 14 years or until the end of the calendar year in which he or she reaches age 70, whichever occurs first. Vacancies on the court are filled by gubernatorial appointment from among individuals found to be qualified by a nonpartisan Commission on Judicial Nomination. In order to be eligible for appointment, candidates must have been admitted to the practice of law in New York for at least 10 years. All appointments must be approved by the State Senate. The Governor is empowered to designate justices of the Supreme Court to serve as additional Associate Judges on the Court of Appeals during times of heavy caseload.

Generally, all seven judges of the Court of Appeals hear each case, although the Constitution requires only a quorum of five judges. In every case the concurrence of at least four judges is necessary for a decision.

The operations of the Court of Appeals are supervised and controlled by the court itself, the Chief Judge, and the clerk of the court. The Chief Judge serves as the principal officer of the court and oversees its maintenance and operation. The Chief Judge presides at the hearing of arguments and at the conference of judges during which decisions are reached.

3.2 Appellate Division

Established in 1894, the Appellate Division of the Supreme Court serves a very important function in the administration of justice in New York State. The four courts of the Appellate Division correspond geographically to the four Judicial Departments on the map in Figure 3.2 [25]. They are constituted as courts of intermediate appellate jurisdiction. For all practical purposes, however, they serve as courts of last resort; 90 percent of the cases they hear are not subsequently reviewed by the Court of Appeals.

Under the Constitution and implementing statutes, appeals in civil matters are taken to the Appellate Divisions from each of the trial courts in the unified court system, except the New York City Civil Court, and district, town, village and city courts outside the City of New York. On an appeal, the Appellate Division reviews questions of law and questions of fact. Appeals in criminal matters are taken to the Appellate Division from County and Supreme Courts. As in civil cases, the Appellate Division reviews questions of fact and questions of law in criminal appeals. The Appellate Division also has original jurisdiction in a limited number of cases.

The State Constitution authorizes the First and Second Judicial Departments to have seven justices while the Third and Fourth Judicial Departments are each authorized to have five justices. The Governor can assign additional justices to each of the courts to assist with the case load. Justices of the Appellate Division, other than the presiding justice, are designated by the Governor from among the justices elected to the Supreme Court. The term of office of each justice is five years, but is limited also to the end of the calendar year in which the justice reaches age 70. However, Associate Justices who have been certified for continued service may be designated to remain on an Appellate Division beyond this retirement age. While the Governor is not generally limited to choosing justices who reside in the Judicial Department where a vacancy exists, the Constitution requires that a majority of the justices designated to sit in any Appellate Division shall be residents of that Department.

The presiding justice of each Appellate Division is designated by the Governor from among the Supreme Court justices in that Department. The term of office of the presiding justice equals the period of time remaining in his or her term as a Supreme Court justice. From time to time, as terms expire or vacancies occur, the Governor makes new designations. The Governor is also empowered to make additional designations during times of heavy caseload, or when a sitting justice is unable to serve for a period of time.

The Appellate Division courts generally sit in panels of five justices, although panels of four justices are authorized. In every case the concurrence of at least three justices is necessary for a decision. The operations of the Appellate Division are supervised and controlled by each court itself, its presiding justice and the clerk of the court.

3.3 Appellate Term

The Constitution authorizes the Appellate Division in each judicial Department to establish an Appellate Term for that Department or a part of that Department. The Appellate Terms are conducted by no more than three Supreme Court justices who have been specially assigned to the terms. Two justices constitute a quorum, and the concurrence of at least two is necessary for a decision. Where they have been established, Appellate Terms exercise jurisdiction over civil and criminal appeals from local courts and certain appeals from county courts. At the present time, Appellate Terms have been established only in the First and Second Departments.

Figure 3.2: Judicial Districts of New York

3.4 Supreme Court

The Supreme Court, as presently constituted, was established in 1846. Formed by the consolidation of the offices of circuit judge and chancery judge with the preexisting Supreme Court, it is now considered a single court having general original jurisdiction in law and equity.

Under this broad constitutional grant of jurisdiction, the Supreme Court may hear any criminal or civil action or

proceeding irrespective of its nature or amount, except claims against the State. In practice, however, the Supreme Court outside New York City principally hears civil matters, and the County Courts hear criminal matters. In New York City, Supreme Court sits in both civil and criminal parts.

Justices are elected for 14-year terms by electors within their judicial districts. Retirement is mandatory at the end of the calendar year in which a justice reaches age 70, but justices can be certified for up to three two-year periods after reaching 70. A justice of the Supreme Court must have been admitted to practice law in the State for at least 10 years before assuming office. The number of justices for each judicial district is prescribed by the State Legislature, subject to a constitutionally prescribed maximum number.

3.5 Court of Claims

From 1777 until 1897, New York State did not permit any claim for damages to be asserted against it in any court. During that period, the state was entirely immune from suit in its courts. Individuals suffering injury to their persons or property through the activities of public employees were not, however, wholly without remedy, as they could petition the Legislature for redress in the form of private legislation. In 1817, an administrative remedy was made available for some claims related to the Erie Canal. From this modest 1817 provision, the Court of Claims evolved through many enactments, culminating in Chapter 36 of the Laws of 1897.

Article VI, section 9, of the Constitution provides: “The Court shall have jurisdiction to hear and determine claims against the state or by the state against the claimant or between conflicting claimants as the legislature may provide.”

Implementing this grant of authority, the Legislature has provided that the Court of Claims shall have jurisdiction over claims against the State for appropriation of real or personal property, breaches of contract, and torts. The Legislature also has specifically granted the court jurisdiction to hear claims involving: wrongful acts by members of the military; military employees in the operation of any vehicle or aircraft; and claims of imprisoned convicts later pardoned as innocent by the Governor. The court serves as a forum for claims by or against the State and certain public authorities. It does not possess the power to grant claims against political subdivisions such as counties, cities, towns and villages. These claims are litigated in the Supreme Court. The Court of Claims currently consists of 26 judges, who hear claims against the State. The court holds two trial terms each year in each of its 9 districts throughout the state. Claims are usually tried and decided by one judge, unless the presiding judge appoints up to three judges to sit in a particular case. Judges of the Court of Claims are appointed by the Governor, by and with the consent of the Senate, for nine year terms (although retirement is mandatory at the end of the calendar year in which the judge reaches age 70). A judge must have been admitted to practice law in the state for at least 10 years before he or she may begin to serve on the bench.

3.6 County Court

A County Court sits in each of the 57 counties of the state outside the City of New York. Under the Constitution, they have unlimited criminal jurisdiction, but their civil jurisdiction is limited to money claims for not more than $25,000. The County Court also has limited appellate jurisdiction; in the Third and Fourth Judicial Departments, it hears appeals from civil and criminal judgments of justice courts and city courts.

The State Constitution of 1846 declared that there should be elected in each of the counties of the state, except the City and County of New York, one county judge, who should hold office for four years. The term of office has been changed to 10 years, but the office has remained elective. A candidate, to be eligible for election, must have been admitted to practice law in the state for at least five years and must be a resident of the county. Retirement is mandatory at the end of the calendar year in which a judge turns 70 years of age.

The Constitution authorizes the Legislature to provide that the same individual may hold two or all of the positions of county, surrogate and family court judge at the same time. There are many so-called “two-hat” and “three-hat” judges in upstate counties.

3.7 Surrogate’s Court

The existence of the Surrogate’s Court in New York can be traced back to colonial times, when early Dutch officials exercised jurisdiction over estate matters. This practice continued through the British colonial period. The granting of letters of administration and the probate of wills in the State of New York became the responsibility of the Governor. In discharging this responsibility, the Governor was authorized to appoint a delegate to act in his stead. One of the early delegates used the title of “surrogate.”

The Constitution (Article VI, section 12) provides that the Surrogate’s Court shall have jurisdiction over all actions and proceedings relating to:

- the affairs of decedents, probate of wills and administration of estates;
- the guardianship of the property of minors; and
- such other actions and proceedings, not within the exclusive jurisdiction of the Supreme Court, as may be provided by law.

In practice, the court’s jurisdiction, which includes such equity jurisdiction as may be provided by law, extends to, among other proceedings: the probate and construction of wills; grants of letters testamentary to executors; grants of letters of administration; proceedings for the payment of creditors’ claims; proceedings by fiduciaries and claimants to determine the ownership of property; proceedings for the payment of bequests; grants of letters of trusteeship; appointment of guardians for infants and their property; and accountings by executors, administrators, trustees and guardians.

The Constitution provides that there shall be at least one judge of the Surrogate’s Court in each county and such number of additional judges as may be provided by law. Each judge of the Surrogate’s Court, also known as a “surrogate,” must be a resident of the county in which the surrogate serves and elected by the voters of that county. The term of office is 14 years within the five counties of the City of New York and 10 years in the other 57 counties. All surrogates are subject to mandatory retirement at the close of the calendar year in which they turn 70 years of age.

There is no constitutional requirement that the surrogate be a separately elected position. The Legislature has provided that where it is not, the county court judge shall discharge the duties of the surrogate, as well as those of the County Court.

3.8 Family Court

Viewed as one of the major accomplishments of the 1962 constitutional reorganization of the judiciary, the Family Court has emerged as a major entity in dealing with difficult issues involving children and families. The court sits in every county in the state outside of New York City, and citywide in New York City.

The Family Court’s jurisdiction is divided between matters that originate as provided by law and those that are referred to it from the Supreme Court. The court’s original jurisdiction includes authority to adjudicate matters related to the:

- protection, treatment, correction, and commitment of minors;

- custody of minors;
- adoption of persons (shared concurrently with Surrogate's Court);
- support of dependents;
- establishment of paternity; and
- proceedings for conciliation of spouses and family offenses (shared concurrently with courts with criminal jurisdiction).

The Family Court, when exercising its jurisdiction over matters referred to it from the Supreme Court, has the same powers possessed by the Supreme Court.

In New York City, judges of the Family Court are appointed by the mayor for terms of 10 years. In counties outside the City of New York, judges of the Family Court are elected by the voters of the counties for terms of 10 years. All judges of the Family Court must retire at the end of the calendar year in which they turn 70 years of age.

3.9 Criminal Court of the City of New York

The Criminal Court of the City of New York was constituted in its present form in 1962. The court has its roots in colonial days and is the product of an evolutionary process that culminated in the abolition of two court systems in the City — the Magistrates Court and the Court of Special Sessions — and their replacement by the Criminal Court of the City of New York. The court now has an authorized complement of 107 judges.

The Criminal Court of the City of New York has jurisdiction to adjudicate misdemeanors and offenses less than misdemeanors, and to conduct pre-indictment felony hearings. Most of the court's business consists of traffic violations, and violations of the Administrative Code of New York City or the Multiple Dwelling Law.

Judges of the Criminal Court must be residents of New York City. They are appointed for terms of 10 years by the mayor. Where a vacancy occurs for reasons other than expiration of a 10-year term, the mayor appoints a judge to fill the position for the balance of the unexpired term. Retirement is mandatory at the end of the calendar year in which the judge turns 70 years of age.

3.10 Civil Court of the City of New York

The Civil Court of the City of New York came into existence on September 1, 1962, when it was established through a merger of the City and Municipal Courts as part of the state's plan of court reorganization. The court has jurisdiction over numerous civil actions, including contracts, actions for personal injury, real property actions, and actions in equity. The State Constitution, however, limits the civil jurisdiction in actions involving money claims to a maximum of $25,000. The Civil Court has a special housing part, instituted in 1972, to assure the effective enforcement of state and local laws for the establishment and maintenance of proper housing standards in New York City.

The Civil Court also has a small claims part. Claimants may present a small claim without being represented by an attorney. Corporations, associations and assignees may not institute actions in the small claims part, although they may be sued as defendants. They may, however, institute small claims in the Court's commercial claims part, which observes the same informal, expedited procedures as the small claims part.

The Civil Court presently consists of 120 judges, selected for terms of 10 years by voters within New York City from "districts" established by the State Legislature. Retirement is mandatory at the end of the calendar year in which a judge turns 70 years of age.

3.11 District, Town, Village and City Courts

Minor civil and criminal litigation, as well as the early stages of major criminal litigation, arising outside New York City are handled by district, city, town and village courts. These courts of "inferior jurisdiction," as they are sometimes called, include some of the oldest of the state's courts — town justices date back to the seventeenth century— and some of the newest — the Nassau and Suffolk District Courts were established in 1937 and 1964, respectfully. The population centers served by courts of inferior jurisdiction range from small cities, villages and towns, many of which have populations under a thousand, to counties having more than one million residents. These courts deal with a variety of matters, including simple traffic offenses, bill collection cases, felony hearings, and complex commercial litigation.

Town and village courts are staffed by full-time or part-time justices, who often are not lawyers. District courts and some of the city courts are staffed by full time judges who are lawyers. Court sessions are held in places ranging from the justice's living room or office, to rooms in town or village halls, to formal court houses. In some localities, court records are kept directly by the judicial officer. In others, records are kept by one or more full-time or part-time clerks.

An initiative to achieve procedural uniformity in the lower courts in New York culminated in the enactment of sections of the Uniform Court Acts, which assure that procedures followed in these courts are substantially the same throughout the state.

3.11.1 Town Courts

The town justice court is the oldest of the "inferior" courts in the state (see also Chapter 7 [69]). Under the original town structure, justices of the peace were members of the town board and thus had legislative as well as judicial functions. The Town Law, adopted in 1934, substituted town councilmen for justices on the town board in towns of the first class. In towns of the second class, justices remained members of the town boards, although the town boards had the option — by resolution subject to permissive referendum — of providing that justices should not be members of the board. In1976, the Town Law was amended again to preclude all town justices from serving on town boards during the tenure of their judicial office. All town justices of the peace formerly ran their courts independently, regardless of the number of justices in the same town. In 1962, however, the Court Reorganization Amendment integrated town justice courts into the unified court system, and the enactment of the Uniform Justice Court Act firmly established the single court concept in each municipality. All justices of a town are considered to be justices of the same court, and the proceedings of one justice are treated as acts of the whole court. The salaries of judicial and non-judicial personnel of a town justice court are funded by the town.

3.11.2 Village Justice Courts

Although villages appeared as local governmental units as long ago as 1790, village justices have not played the same central roles in village organization as justices of the peace played in town development. The constitutional history of the office of village justice, formerly known as the police justice, starts with the Constitutional Convention of 1846. Until then, village police justices apparently were not the subject of general legislation. At the convention, a proposal was made to authorize the Legislature to create inferior local courts of civil and criminal jurisdiction in cities and villages. Today's village justice court traces its roots to that point in time.

A village justice court has the same jurisdiction within the village as a town justice court has within the town. The cost of village justice court operations is funded locally.

3.11.3 City Courts

Since 1846, the Legislature has been authorized to create city courts of limited jurisdiction and to establish the tenure of city judges and the method of their selection. For many years, the resulting legislative enactments were framed as individual court acts, each affecting only one city. In 1988, however, the Legislature combined all provisions of law regulating city courts and their judgeships into a single section of law. Also, as has been done with town and village justice courts and the district courts, the Legislature has established general procedural and jurisdictional regulations in one consolidated statute of general applicability to all city courts in the state outside the City of New York — the Uniform City Court Act.

3.11.4 District Courts

The first district court was established in Nassau County in 1937, under the provisions of the Constitution and the Alternative County Government Law. The only other district court now in existence is the district court of the First Judicial District of Suffolk County, comprising the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown. It was created by the Legislature with the approval of the voters of those towns in 1963.

Although there are only two district courts now in operation in the state, the State Constitution provides that a district court may be established in any area of the state where the local governing body of the affected area requests the State Legislature to establish such court and where both the Legislature and the voters of that area approve its establishment.

3.11.5 Jurisdiction

District, town, village and city courts have limited civil and limited criminal jurisdiction, as defined in the Uniform Court Acts. In general, the civil jurisdiction of these courts is limited to claims for money damages not exceeding $15,000 in the district court and city courts, and $3,000 in the town and village justice courts, and to jurisdiction over summary proceedings for the recovery of real property. Each court also has jurisdiction over small claims, as discussed below. The criminal jurisdiction of these courts is identical to that of the New York City Criminal Court.

3.11.6 Small Claims

Each town, village, city and district court has a small claims part where money claims up to a maximum of $5,000 ($3,000 in town and village courts) may be heard and determined in accordance with more informal court procedures. Special jurisdictional requirements must be met before a suit may be brought in a small claims part. If suit is brought in a town or village justice court, the defendant must reside or have an office for the transaction of business or a regular employment within the municipality in which the court is located. If brought in a city court, the defendant must reside, have an office or be regularly employed within the county in which the court is located. If brought in a district court, the defendant must reside, have an office or be regularly employed within the territory embraced by the court.

City and district courts also have commercial claims parts where money claims up to a limit of $5,000 may be brought by businesses and heard and determined as in small claims parts.

State rules provide for a simple, informal and inexpensive procedure for prompt determination of small claims and commercial claims. Such claims must receive an early hearing and determination, and the hearings must be conducted in such a way as to ensure substantial justice between the parties according to the rules of substantive law. The parties are not, however, bound by statutory provisions or rules of practice, procedure, pleading or evidence.

3.12 Court Financing

Effective April 1, 1977, New York adopted a unified court budget system. Under this system, the state took over the entire non-capital cost of the operation of all courts and court-related agencies of the unified court system, except town and village justice courts.

3.13 Disciplining of Judges

Effective April 1, 1978, new constitutionally mandated procedures for the disciplining of judges were established. A Commission on Judicial Conduct, comprising 11 persons selected from the community by the Governor, the Chief Judge of the Court of Appeals, and the leadership of the Legislature, has primary responsibility for the investigation and initial determination of complaints against judges. The Commission may admonish, censure, remove or retire judges against whom complaints are sustained. The Court of Appeals may review all determinations.

The Constitution authorizes two other methods by which judges who are found guilty of misconduct may be removed from office, both of which require action by the Legislature: removal by impeachment and removal by concurrent resolution of the Senate and Assembly. Neither method is frequently used.

3.14 Court Administration

Effective April 1, 1978, the structure of court administration in New York changed considerably. The principal features of the new system include:

- appointment of a Chief Administrator of the Courts by the Chief Judge of the Court of Appeals, with the advice and consent of an Administrative Board of the Courts;
- central administrative direction of the courts by the Chief Judge and the Chief Administrator;
- approval by the Court of Appeals of statewide standards and policies governing the operation of all courts;
- promulgation by the Chief Judge, and approval by the Court of Appeals, of a code of conduct for judges; and
- frequent consultation with the Administrative Board of the Courts in court management decisions.

The Chief Administrator has numerous duties. Among the most significant are: preparing the judiciary budget; establishing the terms and parts of court and assigning judges to them; engaging in labor negotiations with unions representing non-judicial employees of the courts; and recommending to the Legislature and Governor changes in laws and programs to improve the administration of justice and court operations. To assist in the performance of these duties, the Chief Administrator has established an Office of Court Administration, staffed by lawyers and management experts. The Chief Administrator has also delegated responsibility to a cadre of administrative judges, each serving on a regional basis.

The Office of Court Administration seeks to reduce the caseload in the state's courts through an alternative approach to resolving problems that develop between people — the Community Dispute Resolution Centers Program. Under the program, which was authorized by the Legislature in 1981 and made a permanent part of the Unified Court system in 1984, the Chief Administrator of the Courts contracts with nonprofit community agencies to provide mediation assistance to help disputants reach mutual agreement. Now operating statewide, these centers take referrals from judges, law enforcement agencies, individuals and others. They handle such matters as animal complaints, breaches of contract, domestic arguments, harassment, landlord/tenant problems, noise complaints, petty larceny, school problems, small claims and ordinance violations.

Chapter 4

Local Government Home Rule Power

The constitutional and statutory foundation for local government in New York State provides that counties, cities, towns and villages are "general purpose" units of local government. They are granted broad home rule powers to regulate the quality of life in communities and to provide direct services to the people. In doing so, local governments must operate within powers accorded them by statute and the New York and United States Constitutions.

The home rule powers available to New York local governments are among the most far-reaching in the nation. The extent of these powers makes the local government a full partner with the state in the shared responsibility for providing services to the people.

Local government in New York State comprises counties, cities, towns and villages, which are corporate entities known as municipal corporations. These units of local government provide most local government services. Special purpose governmental units also furnish some basic services, such as sewer and water services. School districts, although defined as municipal corporations, are single-purpose units concerned basically with education in the primary and secondary grades. Fire districts, also considered local governments in New York State, are single-purpose units that provide fire protection in areas of towns. Fire districts are classified as district corporations. There are other governmental entities which have attributes of local governments but which are not local governments. These miscellaneous units or entities are generally special-purpose or administrative units normally providing a single service for a specific geographic area.

In this country's federal system, consisting of the national, state and local governments, local government is the point of delivery for many governmental services and is the level of government most accessible to and familiar with residents. It is often referred to as the grass-roots level of government.

New York has many local governmental entities that possess the power to perform services in designated geographical areas. While all of these entities fall within the broad definition of "public corporation," [1] only a very small percentage of them are "general purpose" local governments - counties, cities, towns and villages - which have broad legislative powers as well as the power to tax and incur debt. In order to stem the proliferation of overlapping and independent local taxing units, the New York Constitution was amended in 1938 to prohibit the creation of any new type of municipal or other corporation possessing both the power to tax and to incur debt.[2]

While New York has long had counties, towns, villages and cities, their powers have increased greatly in the last century. Originally, each individual local government was created by a special act of the State Legislature. Each

[1] A public corporation includes municipal corporations, district corporations and public benefit corporations. Municipal corporations are cities, towns, villages, counties and school districts. District corporations are territorial divisions of the state with the power to contract indebtedness and to levy (or require the levy of) taxes, such as a local fire district. Public benefit corporations are formed for the purpose of constructing public improvements, such as a local parking authority. District and public benefit corporations are discussed in Chapter 9 [91].

[2] New York Constitution, Article VIII, § 3; see the discussion in Greater Poughkeepsie Library District v. Town of Poughkeepsie, 81 N.Y.2d 574 (1993).

act created the corporate entity, identified the geographical area that would be served by the entity and granted it powers and duties.[3] Over time, the State Legislature adopted general laws to govern the nature and extent of local governments' powers: the Town Law, Village Law, General City Law and the County Law.[4] These general laws still apply, and now are augmented by the overriding constitutional guarantee of "home rule." [5]

A local government's power is primarily exercised by its legislative body. The general composition of legislative bodies for counties, cities, towns and villages is discussed in the individual chapters addressing each particular form of government. The New York State Constitution, however, guarantees and requires that each county, city, town and village have a legislative body elected by the people of the respective governments.[6] Local legislative bodies are granted broad powers to adopt local laws in order to carry out their governmental responsibilities.[7]

Local governments serve a vital link in the relationship between the states and the federal government under the federal system. Many governmental services, whether from the national or state level, have implications for, or call for the involvement of, local government. Additionally, in exercising its broad legislative authority, a local government can profoundly impact the quality of life of its residents. This sharing of responsibility with the other levels of government emanates from the federal and state constitutions and the various statutory grants of power which the State Legislature has passed to local governments.

4.1 Constitutional and Statutory Sources of Local Authority

4.1.1 Federal Constitutional Foundation

Because in the states and, particularly in New York, local governments are integral elements of the federal system, neither state constitutional and statutory provisions nor local government legislative actions may contravene the United States Constitution. It is rare for many of the specific restrictions on state powers and authority, such as those found in Article I, section 10, of the federal Constitution, to affect the day-to-day activities of local government, since these restrictions are designed primarily to ensure the supremacy of the national government in foreign relations. Whenever any local government exercises any power accorded it by either the state constitution or by statute it must take care to consider whether its actions would compromise federal constitutional provisions that define the relationship of the state (and, by implication, any of its political subdivisions) within the federal system, or guarantee personal liberties to individuals. For example, Article 1, section 8 of the United States Constitution provides Congress with the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This grant of power over commerce among the States has been interpreted to limit States' power to adversely impact interstate commerce. Local regulatory measures that restrict interstate commerce have been struck down by the United States Supreme Court as unconstitutional.[8]

The federal Constitution also guarantees that certain personal liberties will not be taken away by the federal government or by any state or local government. Of great importance among these are the limitations on state power that derives from the language of the Fourteenth Amendment, which reads in part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[3] The 1777 New York State Constitution, Article XXXVI, confirmed land grants and municipal charters granted by the English Crown prior to October 14, 1775. Chapter 64 of the Laws of 1788 organized the state into towns and cities.

[4] A small group of villages still operate under their original special act charters. See Chapter 8 [81].

[5] See the New York Constitution, Article IX, added to the Constitution in 1963 and effective January 1, 1964.

[6] New York Constitution, Article IX, § 1(a).

[7] New York Constitution, Article IX, § 1(a).

[8] A town's solid waste flow control law which restricted interstate commerce by limiting out-of-state firms' entry to the unsorted garbage market was struck down under what is called the "dormant" Commerce Clause. C.& A. Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).

It is not practicable here to review the many ways in which the Fourteenth Amendment limits and restricts the exercise of state and local power. Suffice it to say that in exercising the general power to make regulations for the "…health, peace, morals, education, and good order of the people…" — the power known as "police power" — the state, as well as its local governments, must be careful to do so only in ways that do not contravene the "due process of law," "equal protection of the laws," and "privileges and immunities" provisions of the Fourteenth Amendment.

4.1.2 State Constitutional Foundation

Local governments look to the State Constitution for the basic law which provides for their structure, powers and operational procedures. Two articles of the State Constitution concern key local government needs: home rule (Article IX) and finance (Article VIII). Article IX, entitled "Local Government," is commonly referred to as the "Home Rule" article of the Constitution, for it provides both an affirmative grant of power to local governments over their own property, affairs and government, and restricts the power of the State Legislature from acting in relation a local government's property, affairs, and government pursuant only special laws upon home rule request or to general laws.[9] This article includes:

- a local government bill of rights;
- local government's power to adopt local laws;
- the duty of the State Legislature to provide for the creation and organization of local governments;
- the duty of the Legislature to enact a statute of local governments;
- restrictions upon the power of the Legislature to act by special legislation in relation to the property, affairs or government of a local government;
- the power of the Legislature to confer additional powers upon local governments.

Article VIII, entitled "Local Finances," contains the constitutional powers pertaining to local taxation and the incurring of debt. Among its provisions are the following:

- prohibition on gift and loan of public money or property to any private undertakings except for the care of the needy;
- prohibition of loan or credit to any public or private individual, corporation or undertaking;
- authorization for two or more local governments to incur debt for cooperative arrangements;
- limitations on the amount of debt that counties, cities, towns, villages and school districts may contract and the purposes for which such debt may be incurred;
- limitation on the creation of a municipal or other corporation which would have both the power to levy taxes and the power to incur debt other than a county, city, town, village, school district or fire district;
- the manner of computation of the amount of debt that may be incurred, including specified exclusions from the total debt-incurring power;
- limitations on the amount of real property taxes that may be raised for local purposes; and
- the power of the State Legislature to restrict the powers of taxation and incurring of debt.

[9] New York Constitution, Article IX, § 2(b)(2).

Table 4.1 [36] indicates other articles of the State Constitution which contain references relating to local government powers and operations or which place restrictions on the State Legislature. Article IX of the State Constitution grants power in two ways: directly, where the grants are, in effect, self-executing and require no further state legislative implementation; and indirectly, where the grants require further legislation before they can be exercised.

Examples of direct grants of power are contained in section 1 of Article IX of the State Constitution, entitled "Bill of Rights for Local Governments." These rights include: (1) the right of a local government to have a legislative body elected by the people; (2) the power to elect or appoint local government officers whose election or appointment is not otherwise provided for by the Constitution; (3) the power to take private property for public use by eminent domain; and (4) the right to make a fair return on local government utility operations.

In some cases, although the Constitution sets forth direct grants of power, these grants may still be subject to state legislative implementation through enactment of procedural steps for their use. For example, Article IX of the State Constitution grants local law powers to local governments, but the exercise of the local law power must be in accordance with the procedures set forth in the Municipal Home Rule Law, which was enacted by the State Legislature to implement the constitutional grants of power.

Some grants of power require additional legislative authorization or direction in order for a local government to utilize them. These grants include: (1) the power to engage in cooperative undertakings as authorized by the Legislature; (2) the power to apportion the costs of governmental services as authorized by the Legislature; and (3) the power for counties to adopt alternative forms of county government under a special law or a general law enacted by the State Legislature.

These constitutional references indicated in the following table are intended only to acquaint the reader with the existence of a constitutional base for local governments. Determining whether a local government may exercise a particular power or function requires a greater familiarity with the complete text of the constitutional provision, the state legislative implementation, and judicial interpretations, if any.

Table 4.1: Constitutional Provisions Relating to Local Government

New York State Constitution	**Subject**
Article V, §6	Prescribes civil service merit system.
Article V, §7	Prescribes that after July 1, 1940 membership in any pension or retirement system of the state or civil division is a contractual relationship and cannot be diminished or impaired.
Article VI	Provides for the court system.
Article X, §5	Prescribes the power of the State Legislature to create public corporations.
Article XI	Provides for the educational system.
Article XIII	Contains several provisions relating to local office holders, including: filling of vacancies, compensation of constitutional officers and election of city officers.
Article XVI	Contains the general provisions relating to taxing authority.
Article XVII	Contains the basic provisions relating to public assistance and the social services system.
Article XVIII	Provides the authority for the provision of low-rent housing and nursing home accommodations for persons of low income and for urban renewal.

4.1.3 The Statutes

In many instances, the Constitutional provisions described above direct the State Legislature to adopt laws which give local governments the authority to take certain legislative actions, such as entering into inter-municipal agreements or adopting city or county charters. The State Legislature also may delegate to local governments additional authorizations as it deems appropriate or necessary to enable local governments to fulfill their obligations in the partnership of government.

The Legislature has enacted a body of law, known as the Consolidated Laws, containing the statutory provisions from which local governments derive most of their substantive and procedural power. The title of each volume of the law generally suggests the subject matter or level of government to which it has primary application. Table 4.2 [37] indicates the Consolidated Laws most relevant to local government.

Table 4.2: Consolidated Laws Relating to Local Government

Law	**Scope**
Civil Service Law	The state's merit system; powers and duties of the State Civil Service Commission; provisions for civil service administration at the local level; the Public Employees' Fair Employment Act, commonly referred to as the Taylor Law.
County Law	The structure, administrative organization, and power and duties of county government.
Education Law	The powers of the State Education Commissioner; the structure, organization, and powers and duties of school districts; and the basic programs of state aid to school districts.
Election Law	The conduct of elections.
Eminent Domain Procedure Law	Procedure for acquiring property by exercise of the power of eminent domain.
General City Law	The powers and duties of cities generally, as well as specific authorizations of taxation for the City of New York.
General Municipal Law	Powers and duties pertaining to all local governments and school districts, including provisions relating to the maintenance of reserve funds, planning activities, cooperative undertakings, establishment of municipal hospitals, public bidding requirements, municipal airports, local bingo and games of chance option, urban renewal, annexation, and conflicts of interest.
Highway Law	Construction and maintenance of state highways and arterials; powers of the State Department of Transportation; powers and duties of county and town superintendents of highways; the construction and maintenance of county and town highways, including limitations on expenditures for certain highway-related purposes, as well as state aid programs for highways.

Table 4.2: (continued)

Law	Scope
Local Finance Law	Authorizations and procedures relating to the incurring of debt by counties, cities, towns, villages, school districts, fire districts and district corporations.
Municipal Home Rule Law — Statute of Local Governments	Basic authorizations, requirements and procedures for the adoption of local laws by counties, cities, towns and villages, and the procedures for enactment and revision of county charters and city charters, as well as the Statute of Local Governments.
Public Officers Law	Provisions applicable to state and local officers, including residency requirements, official oaths and undertakings, resignations, filling of vacancies, removal from office, public access to records and open meetings.
Retirement and Social Security Law	State and local retirement systems.
Second Class Cities Law	The organization of cities which were classified as cities of the second class on December 31, 1923. This law has limited application.
Tax Law	General taxation laws of the state and authorizations for sales and use taxes by counties, cities and certain school districts.
Town Law	The structure, organization, provision of services, and powers and duties of towns and fire districts, as well as fiscal procedures and requirements.
Vehicle and Traffic Law	State operation and regulation of vehicular traffic as well as authorizations for regulation by counties, cities, towns and villages.
Village Law	The structure, organization, powers and duties of villages.
Volunteer Firefighters' Benefit Law	Disability or death benefits for firefighters or their families as a result of injuries or death arising from the performance of duties by volunteer firefighters.
Workers' Compensation Law	Workers' compensation benefits for employees of public as well as private employers. Also contains authorizations for self-insurance plans by local governments.

This listing is not a complete compilation of the laws having local government application. Many other laws that have significance either to a particular level of government or to an individual local government are scattered through the statutes. For example: the State Finance Law sets forth the provisions relating to the state's revenue-sharing programs; the Labor Law contains provisions relating to prevailing wage requirements in public works contracts; the Agriculture and Markets Law contains provisions relating to the establishment of agricultural districts, dog regulation and impoundment and sealers of weights and measures; the Correction Law contains provisions relating to supervision and administration of county jails and penitentiaries and state supervisory powers over

city jails; the Parks, Recreation and Historic Preservation Law contains authorizations for historic preservation and local snowmobile operation regulation; and the Transportation Corporations Law contains local government approval requirements for the formation of private sewer and waterworks corporations. The Social Services Law, Mental Hygiene Law, Real Property Tax Law and Public Health Law are discussed elsewhere in this book.

4.1.4 Statute of Local Governments

Article IX of the State Constitution required the State Legislature to enact a "Statute of Local Governments" in order to grant certain powers to local governments. The granted powers include the power to: adopt ordinances, resolutions, rules and regulations; acquire real and personal property; acquire, establish and maintain recreational facilities; fix, levy and collect charges and fees; and in the case of a city, town or village, to adopt zoning regulations, and conduct comprehensive planning.

The powers granted in the Statute of Local Governments are accorded quasi-constitutional protection by Article IX; a power so granted cannot be repealed, impaired or suspended, except by the action of two successive Legislatures, and with the concurrence of the Governor. Thus, for example, the repeal of village ordinance power by the State Legislature was accomplished by Chapter 975 of the Laws of 1973 and Chapter 1028 of the Laws of 1974.

The Statute of Local Governments reserves certain powers to the State Legislature, even where the exercise of these powers could or would diminish or impair a local power. These include the power to take actions relating to the defense of the state, to adopt laws upon local home rule request, to adopt laws relating to creating alternative forms of county government and to adopt laws relating to matters of overriding state or regional concern.

4.1.5 Limitations on the State Legislature

The powers of the State Legislature are derived from Article III of the State Constitution, as well as from other Constitutional provisions. Additional powers, as well as restrictions thereon, were conferred upon the Legislature by Article IX of the State Constitution, which directs the State Legislature to adopt certain laws necessary to affect the local powers granted by that article. Article IX also restricts the State Legislature from adopting special laws which affect a local government's property affairs or government. Article IX, therefore, serves both as a source of authority for local governments and as a shield against intrusion by the State upon their home rule prerogatives.

The restriction upon the State Legislature's legislative powers is predicated upon the phrases "property, affairs or government" and "general law." The Legislature is specifically prohibited from acting with respect to the property, affairs or governance of any local government except by general law, or by special law enacted on a home rule request by the legislative body of the affected local government or, except in the case of the City of New York, by a two-thirds vote of each house upon receiving a certificate of necessity from the Governor. The definitions of the terms "general law" and "special law" as set forth above also apply in the context of this provision.

4.1.6 Local Laws and Ordinances

Local legislative enactments must be considered in order to fully define the power and authority of a local government. City and county charters originally were adopted by a special act of the State Legislature when a city or county was created. These charters created the municipal corporation and, importantly, directed its organization, its responsibilities and accorded its powers. The Municipal Home Rule Law, pursuant to constitutional direction, authorizes cities to amend their charters and counties to adopt or amend charters by local law.[10] Charters of charter local governments must be consulted in order to ascertain the nature and extent of any power held by that government.[11]

[10] Municipal Home Rule Law, Article 4.

[11] This holds true for any charter village, as well.

Once a local government adopts an ordinance or local law, the government is bound by such legislative enactment until it is amended or repealed. Since local laws may direct that a local government's power be exercised in a certain manner, and, in some instances, may supersede state law (to be discussed later), the local government's local laws and ordinances must be consulted in order to fully define its powers.

4.1.7 Administrative Rulings and Regulations

Local government powers also may be expanded, restricted or qualified by the rules and regulations of state agencies. These rules and regulations are usually adopted as part of the implementation of a state program having local impact or application. Thus, it is advisable to review state regulations on the particular subject in order to ascertain the extent of local authorization in undertaking a particular activity or program.

An example is the promulgation of a local sanitary or health code. While a local government may promulgate such a code, it must first ascertain what areas of regulation have been covered by the State Sanitary Code. The State Sanitary Code and other rules and regulations appear in the Official Compilation of Codes, Rules and Regulations of the State of New York, which is published and continually updated at the direction of the Secretary of State.

4.1.8 Home Rule and Its Limitations

What "home rule" means depends upon the context in which it is used. Home rule in a broad sense describes those governmental functions and activities traditionally reserved to or performed by local governments without undue infringement by the state. In its more technical sense, home rule refers to the constitutional and statutory powers given local governments to enact local legislation in order to carry out and discharge their duties and responsibilities. This affirmative grant of power is accompanied by a restriction upon the authority of the State Legislature to enact special laws affecting a local government's property, affairs or government.

4.1.9 Interpreting Home Rule

Originally, the powers of local legislation were derived from specific delegations from the State Legislature. These delegations concerned specific subjects and were narrowly circumscribed. The courts applied strict rules of construction when called upon to interpret state statutes which delegated legislative power to local governments. However, with the evolution of the broad home rule powers, which culminated in constitutional grants to all local governments in 1964, there emerged a gradual recognition that the rules of strict construction were no longer applicable to the interpretation of such delegated powers. Rather, the same rules of liberal construction applicable to enactments of the State Legislature should be applied to the local law power.

Judicial interpretations of the Home Rule article illustrate the tension between the affirmative grant of authority to local governments and the reservation of matters outside the term "property, affairs or government" of local governments to the State Legislature. In a society where many issues transcend local boundaries, a growing number of matters are considered to be matters of state concern.[12]

The home rule powers enjoyed by local governments in this state are among the most advanced in the nation. By recognizing the extent of their powers and by continuing to exercise them, local governments can best avoid the erosion of such powers. In this fashion, local governments will not only serve the needs of the people, but will strengthen state-local relationships as well.

[12] The most recent home rule cases indicate a growing class of state concerns. City of New York v. State of New York, 76 N.Y.2d 479 (1990); Albany Area Builders Association v. Town of Guilderland, 74 N.Y.2d 372 (1989).

4.2 Local Legislative Power

4.2.1 Forms of Local Legislation

Local legislation may take the form of local laws, ordinances and resolutions.

A local law is the highest form of local legislation, since the power to enact a local law is granted to local governments by the State Constitution. In this respect, a local law has the same quality as an act of the State Legislature, since they both are exercises of legislative power accorded by the State Constitution to representative bodies elected by the people. Indicative of this is the fact that acts of the State Legislature and local laws are both filed with the Secretary of State, the traditional record keeper for State government.

An ordinance is an act of local legislation on a subject specifically delegated to local governments by the State Legislature. Counties do not ordinarily possess ordinance powers and the power of villages to adopt ordinances was eliminated in 1974.

A resolution is a means by which a governing body or other board expresses itself or takes a particular action. Unlike local laws and ordinances, which can be used to adopt regulatory measures, resolutions generally cannot be used to adopt regulatory measures. Exceptions exist to this rule, however, as authorized by the State Legislature. For example, section 153 of the County Law provides that a power vested in a county may be exercised by local law or resolution.

4.2.2 The Local Law Power

Article IX of the State Constitution was implemented in 1964 by the State Legislature through the enactment of the Municipal Home Rule Law, which reiterates and explicates the constitutional local law powers and provides procedures for adopting local laws.

Both the Constitution and the Municipal Home Rule Law provide the following categories of local law powers:

- The power to adopt or amend local laws relating to their property, affairs or government which are not inconsistent with the provisions of the Constitution or with any general law;
- The power to adopt or amend local laws, not inconsistent with the Constitution or any general law, relating to specifically enumerated subjects, whether or not these subjects relate to the property, affairs or government of the local government, and subject to the power of the Legislature to restrict the adoption of local laws in areas not relating to property, affairs or government; and
- The State Legislature is expressly empowered to confer upon local governments additional powers not relating to their property, affairs or government and to withdraw or restrict such additional powers.

The phrase “property, affairs or government” is a term of art which has been defined largely by court decisions which have determined what it is not.[13] Even where the subject matter of a local law falls instead within the meaning of “property, affairs or government,” the local law must be consistent with all general state laws and with the Constitution.

The second category of local laws set forth above includes the specifically enumerated topics found in section 10 of the Municipal Home Rule Law. For example, a county, city, town or village may, by local law, modify the powers, qualifications, number, mode of selection and removal, terms of office, compensation and hours of work of its officers and employees. It may: create and discontinue departments of its government; decide the membership and composition of its legislative body; and regulate the acquisition and management of property, the levy collection

[13] For example, the phrase “property, affairs or government” is not “matters of state concern”.

and administration of local taxes and assessments, and the fixing, levying and collecting of local rental charges and fees. It may also provide for the protection of its environment, the welfare and safety of persons and property within its boundaries, and the licensing of business and occupations.

Additional powers are conferred upon counties, cities, towns and villages in section 10 of the Municipal Home Rule Law, for example:

- Counties may assign administrative functions to the chairperson of the county legislative body, create an administrative assistant to the chairperson, and provide for the control of floods and reforestation of lands owned by the county;
- Cities may revise their charters, as well as authorize benefit assessments for local improvements;
- Towns may adopt local laws relating to the preparation, making, and confirmation of assessments of real property and the authorization of benefit assessments, consistent with state law. They may also supersede any provision of the Town Law in relation to an authorized area of local legislation, unless such supersession has been restricted by the State Legislature and except for those provisions of the Town Law relating to improvement districts, areas of taxation, referenda and town finances;
- Villages may authorize benefit assessments and may also supersede any provision of the Village Law in relation to an authorized area of local legislation, unless the State Legislature has restricted such supersession.

The courts also have recognized the extent of local law power. In a landmark case, the Court of Appeals, the state's highest court, upheld a locally enacted county charter provision that superseded a general state law.[14] Similarly, a town's authority to supersede provisions of the Town Law has been upheld.[15]

It can be readily seen that the grant of local law power to local governments in New York is quite broad.

4.2.3 Restrictions on Local Law Powers

The local law power is not without its limitations. The restrictions upon the exercise of the local law power are as follows:

- A local law cannot be inconsistent with the Constitution or with any general law. The term "general law" is defined in the Constitution as a law enacted by the State Legislature which in terms and in effect applies alike to all counties outside the City of New York, to all cities, to all towns or to all villages. Conversely, a special law is defined as one which applies to one or more, but not all, counties, cities, towns or villages;
- A number of specific restrictions or qualifications are contained in the Constitution or have been enacted by the State Legislature, such as those set forth in section 11 of the Municipal Home Rule Law. This section, for example, restricts the adoption of a local law if it would remove a restriction of law relating to the issuance of bonds;
- Local law power is restricted where the subject of the local law is one considered to be of "state concern." "Matters of state concern" is a phrase born in judicial opinions rather than in the Constitution or statutes. It is a term used by the courts to define what local governments may not accomplish by local law – in other words, what is not within their "property, affairs or government." Matters of state concern are those of sufficient importance to require State legislation. If the matter is to a substantial degree a matter of State interest, it is considered a matter of State concern, even if local concerns are intermingled with the State concerns.[16] Court cases construing the home rule grants have indicated that "state concern" includes such matters as taxation, incurring

[14] Town of Smithtown v. Howell, et al., 31 N.Y. 2d 365, 339 N.Y.S. 2d 949.
[15] Kahmi v. Town of Yorktown, 74 N.Y.2d 423 (1989).
[16] See Adler v. Deegan, 251 N.Y. 467 (1929) and Wambat Realty Corp. v. State of New York, 41 N.Y.2d 490 (1977).

of indebtedness, education, water supply, transportation and highways, health, social services, aspects of civil service and banking. As a general principle, a local government may not adopt a local law relating to a "matter of state concern" unless the Legislature has specifically granted such power by law; and

- Local law power is restricted where the subject of proposed local law action has been preempted by the state. Preemption occurs when the State Legislature specifically declares its intent to preempt the subject matter, or when the Legislature enacts sufficient legislation and regulation so as to indicate an intent to exclude regulation by any other governmental entity. The courts have termed such indication intent to "occupy the field."

4.2.4 Referenda

New York's governmental heritage is that of a representative form of government where most matters are addressed by elected officials. Certain matters of particular importance, however, are set aside to be confirmed by the voters through referenda. These matters generally include approval of Constitutional amendments and bonding authorizations. The preference for a representative form of government also carries through to the local level. Matters may be set for local referendum only when authorized by state statute. Certain local laws, which are subject to mandatory referendum, do not become effective until approved by the voters through a referendum. The referendum requirements that apply to local laws are set forth primarily in sections 23 and 24 of the Municipal Home Rule Law, and are discussed at greater length in Chapter 10 [103].

Chapter 5

County Government

While originally established to serve as instrumentalities of the state existing for state purposes, counties in New York are now full-service general purpose units of government that provide a vast array of services to their residents.

5.1 What is a County?

New York counties started as entities established by the State Legislature to carry out specified functions at the local level on behalf of the state. During the 20th century, county government in New York underwent major changes in function, form and basic nature.

The counties in New York are no longer merely subdivisions of the state that primarily exist to perform state functions. The county is now a municipal corporation with geographical jurisdiction, home rule powers and the fiscal capacity to provide a wide range of services to its residents. To some extent, counties have evolved into a form of "regional" government that performs specified functions and which encompasses, but does not necessarily supersede, the jurisdiction of the cities, towns and villages within its borders.

New York State outside New York City is divided into 57 counties. The five boroughs of the City of New York function as counties for certain purposes, although they are not organized as such nor do they operate as county governments. Unless otherwise indicated, references to counties in this chapter will apply only to those outside New York City. Counties in New York are diverse in population and demographics. The 2010 Census populations of the counties vary from Suffolk County's 1,493,350 to Hamilton County's 4,836. St. Lawrence County is the largest in geographical area, with over 2,700 square miles, and Rockland is the smallest, with an area of 175 square miles. The most densely populated county is Nassau County with more than 4,700 people per square mile, and the most sparsely populated is Hamilton County, with fewer than 3 people per square mile. The population of New York's counties is shown in Table 5.1 [46] and Table 5.2 [48].

Of the state's 57 counties outside New York City, 21 contain no cities. All counties include towns and villages, although the number of each varies widely. For example, St. Lawrence, Cattaraugus and Steuben counties each contain 32 towns, while there are only three towns in Nassau County. Hamilton and Warren counties each contain one village to the 64 villages within Nassau County.

The foregoing statistics demonstrates that not all counties in New York State are alike. The State of New York has some of the most urban and rural counties in the nation, and the interests, concerns and governmental expectations of their residents are similarly diverse.

5.2 Historical Development

The patterns of county government organization in New York were set in colonial times. The "Duke's Laws" of 1665 created "ridings," or judicial districts, which were in effect a system of embryonic counties. In 1683, an act of the first Assembly of the Colony established the first 12 counties — adding 2 to the 10 which had previously come into existence — and created the office of sheriff in each county. These original counties were Albany, Cornwall, Dukes, Duchess, Kings, New York, Orange, Queens, Richmond, Suffolk, Ulster, and Westchester. Cornwall and Dukes were deemed part of Massachusetts after 1691. County legislative bodies began at the same time, when freeholders, later known as supervisors, were elected to represent each town in the establishment of tax rates to defray the costs of county government, including the operation of a court house and a jail.

The reasons for the creation of county governments in the early colonial period appear to have been practical: to improve protection against enemies and to provide a more broadly based mechanism for maintaining law and order. The first duties of county government lay in these functional areas. The sheriffs in the first counties were appointed by the Governor and could serve only one term. The first State Constitution in 1777, which designated counties, towns and cities as the only units of local government, recognized the existence of 14 counties that had been established earlier by the colonial Assembly. Two of those counties were ceded to Vermont in 1790 in the settlement of the New Hampshire land-grant controversy. All of New York's other 50 counties were created by acts of the State Legislature. The state's newest county, Bronx, was established in 1914.

The basic composition of the counties was set in 1788 when the State Legislature divided all of the existing counties into towns. Towns, of course, were of earlier origin, but in that year they acquired a new legal status as components of the counties.

Throughout the nineteenth century, additional counties were created, usually when an area contained approximately 1,000 residents. New counties were typically formed out of existing counties, some of which originally covered vast geographical areas.

Table 5.1: New York State Counties [1]

County	Chief Administrative Official	Legislative Body	Number of Members	Population**
Albany*	Executive	Legislature	39	304,204
Allegany	Administrator	Legislature	15	48,946
Broome*	Executive	Legislature	15	200,600
Cattaraugus	Administrator	Legislature	21	80,317
Cayuga	Manager	Legislature	15	80,026
Chautauqua*	Executive	Legislature	19	134,905
Chemung*	Executive	Legislature	15	88,830
Chenango	Chair of Legislative Body	Supervisors	23	50,477
Clinton	Administrator	Legislature	10	82,128
Columbia	Chair of Legislative Body	Supervisors	23	63,096
Cortland	Administrator	Legislature	17	49,336
Delaware	Chair of Legislative Body	Supervisors	19	47,980
Dutchess*	Executive	Legislature	24	297,488
Erie*	Executive	Legislature	11	919,040
Essex	Manager	Supervisors	18	39,370
Franklin	Manager	Legislature	7	51,599

Table 5.1: (continued)

County	Chief Administrative Official	Legislative Body	Number of Members	Population**
Fulton	Administrator	Supervisors	20	55,531
Genesee	Manager	Legislature	9	60,079
Greene	Administrator	Legislature	14	49,221
Hamilton	Chair of Legislative Body	Supervisors	9	4,836
Herkimer*	Administrator	Legislature	17	64,519
Jefferson	Administrator	Legislature	15	116,229
Lewis	Manager	Legislature	10	27,087
Livingston	Administrator	Supervisors	18	65,393
Madison	Administrator	Supervisors	20	73,442
Monroe*	Executive	Legislature	29	744,344
Montgomery	Executive	Supervisors	9	50,219
Nassau*	Executive	Legislature	19	1,339,532
Niagara	Manager	Legislature	19	216,469
Oneida*	Executive	Legislature	23	234,878
Onondaga*	Executive	Legislature	17	467,026
Ontario	Administrator	Supervisors	20	107,931
Orange*	Executive	Legislature	21	372,813
Orleans	Administrator	Legislature	7	42,883
Oswego	Administrator	Legislature	25	122,109
Otsego	Chair of Legislative Body	Legislature	14	62,259
Putnam*	Executive	Legislature	9	99,710
Rensselaer*	Executive	Legislature	19	159,429
Rockland*	Executive	Legislature	17	311,687
St. Lawrence	Administrator	Legislature	15	111,944
Saratoga	Administrator	Supervisors	22	219,607
Schenectady*	Manager	Legislature	15	154,727
Schoharie	Chair of Legislative Body	Supervisors	15	32,749
Schuyler	Administrator	Legislature	9	18,343
Seneca	Manager	Supervisors	14	35,251
Steuben	Manager	Legislature	17	98,990
Suffolk*	Executive	Legislature	18	1,493,350
Sullivan*	Manager	Legislature	9	77,547
Tioga	Chair of Legislative Body	Legislature	9	51,125
Tompkins*	Administrator	Legislature	14	101,564
Ulster*	Executive	Legislature	23	182,493
Warren	Administrator	Supervisors	20	65,707
Washington	Administrator	Supervisors	17	63,216
Wayne	Administrator	Supervisors	15	93,772
Westchester*	Executive	Legislature	17	949,113
Wyoming	Chair of Legislative Body	Supervisors	16	42,155

Table 5.1: (continued)

County	Chief Administrative Official	Legislative Body	Number of Members	Population**
Yates	Administrator	Legislature	14	25,348

* Denotes a Charter County

Table 5.2: New York City Boroughs/Counties

Borough	Population [2]
Bronx	1,385,108
Kings (Brooklyn)	2,504,700
New York	1,585,873
Queens	2,230,722
Richmond (Staten Island)	468,730

5.3 The Changing Nature of County Government

The basic changes in form, powers and functions, which the counties in New York have been undergoing, have been hastened and facilitated by three major developments:

- The rapid urbanization of many areas of the state after World War II, particularly in the environs of large cities;
- The availability, by general law, of authority for the residents of a county to draft and adopt a home rule charter to provide whatever form of government they consider most appropriate to local needs, and through the charter, to assign to the county government duties and functions they want the county to undertake — within state Constitutional and statutory limitations;
- Basic alteration of the representative base for county legislative bodies resulting from federal and state court rulings requiring that such representation comply with the “one person-one vote” principle.

While county government still must perform as an administrative arm of state government for many purposes, at the same time it must be an independent unit of government exercising powers of its own to meet demands.

As the population spilled out from the central cities of the metropolitan areas, the towns and the counties occupying the periphery had to take on a wide range of new functions, services and duties. As a result, the forms and procedures of county government changed to meet the needs of the metropolitan areas. At the same time, however, the old forms of county government, which largely reflected rural needs and county functions as state administrative units, were retained in areas where they were still appropriate. Even in the latter case, however, it has proven convenient for the state to use the counties in new ways for new purposes in carrying out new state programs and objectives.

[1] County government information courtesy New York State Association of Counties
[3] Source: U.S. Bureau of the Census, courtesy of Empire State Development Corporation

At the present time, most New Yorkers live in counties that are now considered urban because of their population or proximity to a major city. Some counties are marginally urban because of their economic orientation and because people journey to work from those counties to larger metropolitan centers that may be some distance away. This very fact, however, lends an urban aura to those counties even though their primary activities may still have rural characteristics.

5.4 The County Charter Movement

One of the developments that has facilitated the changing nature of county government in New York has been the provision of general law authority for counties to draft and adopt home rule charters by local initiative and action.

Most of the counties of the state still operate, as they did in the past, under the general provisions of the New York State County Law. Even these counties have certain latitude under state law to develop their own organizational structures and to provide for the administration of their services. In fact, a majority of the counties that operate under the County Law have a county administrator or comparable position.

Any county, regardless of size, may gain a much wider scope for local initiative and action through the adoption of a county charter. Table 5.3 [49] lists the 23 charter counties in New York and the year of adoption of their current charter.

Table 5.3: Charter Counties in New York State

County	**Date Charter Adopted**
Nassau	1936
Westchester	1937
Suffolk	1958
Erie	1959
Oneida	1961
Onondaga	1961
Monroe	1965
Schenectady	1965
Broome	1966
Herkimer	1966
Dutchess	1967
Orange	1968
Tompkins	1968
Rensselaer	1972
Albany	1973
Chemung	1973
Chautauqua	1974
Putnam	1977
Rockland	1983
Sullivan	1999
Ulster	2006
Montgomery	2012
Steuben	2013

The spread of the county charter movement in New York has been a relatively recent phenomenon. In 1937, the

Legislature enacted an Optional County Government Law which broadened the scope of local choice as to organization and form. By the early 1950's only three counties — Nassau, Monroe and Westchester — had organized under optional or special charters granted by the State Legislature. Because of the counties indifferent response to this form, in 1952 the Legislature repealed the Optional County Government Law and enacted the Alternative County Government Law, which extended to the counties a choice of four optional alternative forms of government organization. However, no county utilized the provisions of this law. In 1958, Suffolk County was granted an alternative form of county government by special state legislation.

An amendment to the State Constitution in 1959 provided the necessary constitutional basis for locally developed and adopted charters. With the implementing statutes enacted by the State Legislature, the amendment enabled counties to adopt charters that could supersede the governmental structures provided in the County Law. The response was immediate; Erie County in 1959 was the first to adopt its own charter under the new law. In 1961, Oneida and Onondaga Counties followed. Enactment in 1963 of the Municipal Home Rule Law, to which the County Charter Law provisions were transferred, further facilitated the reorganization by charter of county governments. Since that change, the number of counties operating under charters has increased to 23. One of these counties — Herkimer — chose only to reapportion the county legislative body through the county charter method and left intact the organizational arrangements provided under the County Law.

5.4.1 Reform of County Legislative Bodies

A third recent development that significantly impacted county government in New York was the reapportionment of representation in county legislative bodies in response to judicial mandates.

From the earliest days of county government, the county's legislative body — and its executive and administrative elements as well — was a board of supervisors. The board of supervisors consisted primarily of the supervisors of the towns within the county, who were elected solely as town officers at town elections, but who served ex officio as county legislators. In counties containing cities a number of "city supervisors" were elected by city voters, usually by wards, to serve solely as county officials and having no other duties as city officials.

In the early 1960s, the courts found that many of the arrangements in New York for boards of supervisors violated the Equal Protection clause of the Fourteenth Amendment of the United States Constitution. The basis for this ruling was the fact that each town in a county, small or large, had one vote in the legislative body. Thus, a voter in a town with a population of a hundred wielded ten times more weight in the county legislative body than did a voter in a town of a thousand. Accordingly, the counties were ordered to bring the apportionment of their legislative bodies into compliance with the principle of one person-one vote.

The counties of New York State have used one of two basic methods to comply with the Supreme Court's mandate: weighted voting or districting. Some counties still retain the board of supervisor's arrangement, but with an appropriate weighting of the relative voting strength of each supervisor. Other counties now elect legislators from districts, which may or may not coincide with town lines.

Variations of these two basic methods have been used to accommodate local conditions. In some counties, weighted voting provides that each legislator "casts the decisive vote on legislation in the same ratio which the population of his or her constituency bears to the total population." In others, the weighting simply reflects the represented population. Districting has taken the form of single or multi-member districts or a mix of both.

In many cases the members of the county legislative bodies now occupy their positions in that capacity alone; they are clearly county legislators, elected as such. This is a major change in the basic structure of county government, since it can be argued that until the county had its own independently elected legislative body, it could not truly be regarded as a full unit of local government with its own defined powers and its own authority to utilize those powers in response to countywide needs.

5.5 County Government Organization

Four organizational elements exist in some form and in varying degrees among all counties, both charter and non-charter. These are: (1) a form of executive or administrative authority, either separate from or as a part of legislative authority; (2) a legislative body; (3) an administrative structure; and (4) certain elective or appointed officers who carry out specific optional duties and functions.

5.5.1 Executive and Administrative Authority

5.5.1.1 Non-charter Counties

The County Law, which provides the legal framework for non-charter county government, makes no provision for an independent executive or administrative authority. The executive and legislative authority remain joined in the legislative body, which may exercise that function in different ways. The legislative body may organize its committee structure around the functional areas of county government; each committee or its chair exercises a certain amount of supervisory or administrative authority on behalf of the legislative body over the operational arrangements for the provision of the specific service or activity. The legislature may also delegate to its chair a substantial amount of administrative authority to be exercised on its behalf.

As long as the functions of county government were relatively few and simple, such arrangements assured the legislature of direct information about day-to-day county operations. As county functions and programs increased in number, diversified in kind, and expanded enormously in both complexity and cost, this fragmentation of administrative authority often fell short of providing necessary overall supervision and coordinated direction. Partly to correct this inadequacy, the county charter movement spread rapidly during the 1950's and 1960's among the larger and rapidly urbanizing counties of the state.

In addition to the internal arrangements whereby a county legislative body may exercise a certain amount of executive and administrative authority, several provisions of law authorize the county legislature to establish the office of county administrator or a similar office to carry out, on behalf of the legislature, certain administrative functions.

The first of these provisions is section 10(1)(a)(1) of the Municipal Home Rule Law, which authorizes local governments to enact local laws relating to the powers, duties, qualifications, number, mode of selection and removal, and terms of office of their officers and employees. Under this provision, a county may create the office of county administrator or manager, and assign to the office certain administrative functions and duties to be performed on behalf of the county legislature.

A county legislature should keep two factors in mind when creating such an office. The first is to determine whether the powers and functions to be assigned to the office would either diminish the powers of any elected county official or transfer to such an office any powers and duties presently vested by law in other county offices. In such situations, the Municipal Home Rule Law provides for a mandatory referendum. The second is to determine how far the county legislature is empowered to go in assigning various functions and duties to the office of county administrator. At what point will the legislature, in effect, be enacting an alternative form of county government? In other words, how far can the county go in assigning powers and functions before it becomes necessary to enact a county charter?

Another option is found in the Municipal Home Rule Law, section 10(1)(b)(4), which authorizes a county to create by local law the position of administrative assistant to the chairman of the board of supervisors. While such a law may assign specified administrative functions, powers, or duties to this office the board must remain the final authority with respect to such administrative functions and duties.

Finally, Section 204 of the County Law provides that the county legislative body may establish the position of "executive assistant" by local law, resolution, or by inclusion in the county budget.

The foregoing illustrates that a county government without a charter still has a number of options through which it can provide itself with a certain amount of administrative leadership and day-to-day direction. However, the legislative body must retain the executive authority generally embodied in making policy and developing the annual budget.

5.5.1.2 Charter Counties

The principal difference between a county government operating pursuant to the County Law and one operating pursuant to a charter is that a county charter ordinarily provides for an executive or administrator, independent of the legislature, who administers the day-to-day affairs of county government. Of the 23 charter counties in the state, 18 have elected executives, while 3 have professional managers, and 2 have administrators.

Voters in the charter counties of New York, in most cases, have chosen the elected executive form of county government organization. The creation of the office of elected executive provides the county with potentially strong leadership, because the executive is elected by the voters of the entire county. Thus, the executive operates from a strong political base to speak for the county, and to exercise leadership in relation to the legislative body. This principle holds true even where the charter does not endow the executive with extensive powers.

The elected executive also provides a focus of public attention in county government that is lacking in the organization under the County Law. Like elected executives at other levels, the county executive operates under constant scrutiny.

Under most county charters, the elected county executive may secure additional professional administrative assistance, subject to appropriated funds. For example, the executive may provide, within the annual appropriation, for the creation of the office of deputy county executive for administration or for an executive assistant to carry out responsibilities that may be delegated by the executive.

One of the most influential elements of the elected executive's authority is the budgetary power, an essential tool of executive participation in policy development and in strong administration. Through the framing of an executive budget, the county executive establishes and recommends to the county legislature priorities among programs. If they are approved by the legislative body, these priorities provide a direction for the implementation of policies.

Another important element of the authority of the county executive or county manager in charter counties is the power to appoint and remove department heads. The charter may allow the executive to exercise this authority without confirmation or approval by the legislative body, and in other cases, the charter may require the confirmation or approval of the action. In either case, the executive must exercise this authority within the scope of the applicable civil service laws as described in Chapter 13 [143].

Initially, the size of a county's population has much to do with whether the county's voters believe is necessary to provide the county with executive leadership and day-to-day direction of operations by adopting a locally drafted charter. It is possible, however, that other considerations, such as fiscal concerns, are of equal importance. Without a strengthening of executive capacity, the urbanizing counties of the state found themselves severely handicapped in meeting and dealing with new and expanding service demands. Legal authority to draft and adopt a charter locally, one specifically tailored to fit local conditions and requirements, has facilitated the efforts of counties to meet their rapidly growing responsibilities as true units of local government.

5.5.2 County Legislative Bodies

Every county has power to enact laws, adopt resolutions, and take other actions having the force of law within its jurisdiction. This power, along with the related authority to make policy determinations, is vested in a legislative body.

The legislative bodies of the counties are designated by various names, including Board of Supervisors, Board of Representatives, Board of Legislators, and County Legislature. Originally, the legislative bodies of all counties were boards of supervisors, consisting of the town and city supervisors. With the adoption of various reapportionment plans and with the spread of home rule charters, however, other designations were developed according to local preference.

Table 5.1 [46] shows the basic makeup of county legislative bodies, along with their 2010 Census populations. This table illustrates that neither the size of a county's population nor the fact of having a charter have little if anything to do with the size of a county's legislative body. Legislatures range in size from seven members in Franklin and Orleans Counties to 39 in Albany County.

Generally, members of county legislative bodies are elected for either two or four year terms. In counties that have retained a Board of Supervisors, the term of office for each member is two years, except in towns that have exercised the option under the Town Law to extend the term to four years. Of the 57 county legislative bodies, 36 conduct scheduled meetings once a month and 17 meet twice a month. Other meeting patterns are practiced by three counties. One legislative body, Herkimer, conducts a scheduled meeting quarterly but holds additional meetings as needed. All of the legislative bodies convene for special meetings, a fairly frequent occurrence in many counties.

Since the role of the county as a true unit of local government continues to evolve, the legislative bodies of New York counties are continuing to change. Their committee structures, rules of procedure, and patterns of action may reflect some practices of earlier times, but it is clear that adjustments are under way. The heightened responsibility of members of county legislative bodies is indicated by the fact that the budgets they must consider and adopt each year range from tens of millions of dollars in small counties to hundreds of millions in large counties. Several counties have budgets in excess of one billion dollars, and Nassau County's budget exceeds three billion dollars.

5.5.3 Administrative Structure

The administrative structures of county governments in New York are generally similar. The basic organizational arrangements and operational procedures of county administration were set at a time when the functions and duties were few, relatively simple and largely reflective of state objectives. In some counties with smaller and homogeneous populations, the traditional arrangements still provide an adequate administrative structure.

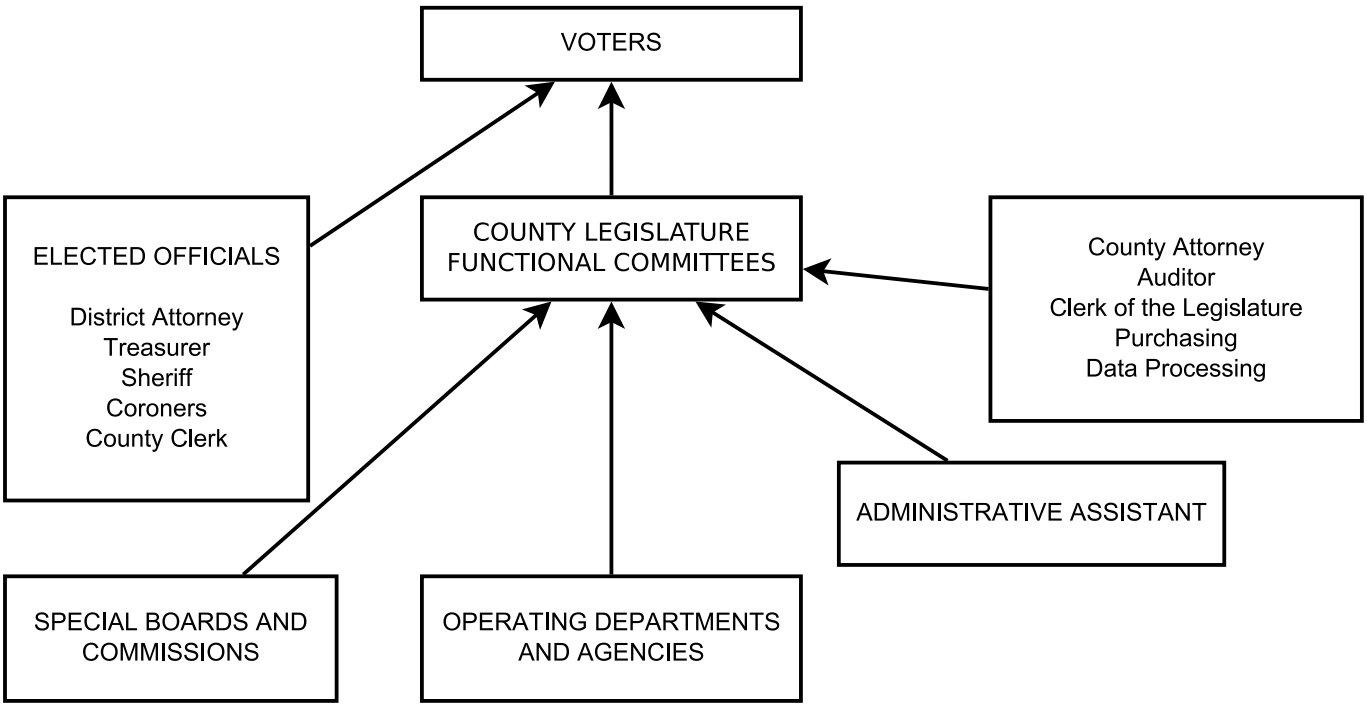

Figure 5.1: County Law Form Organization Chart

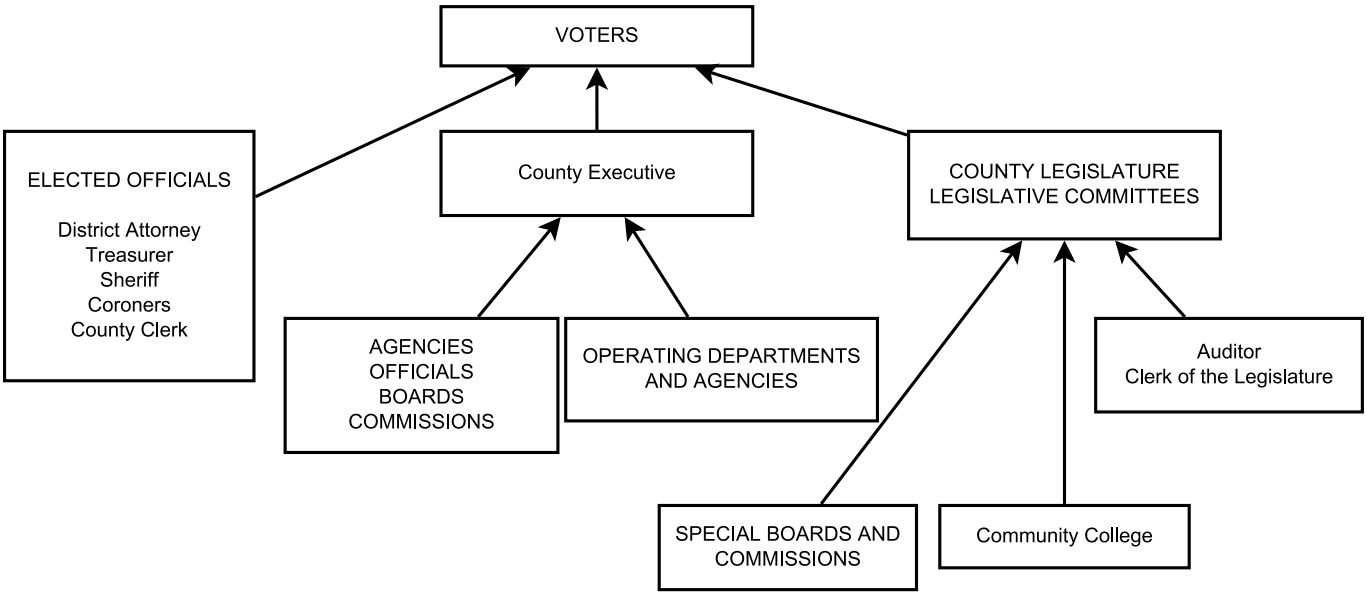

Figure 5.2: County Executive Form Organization Chart

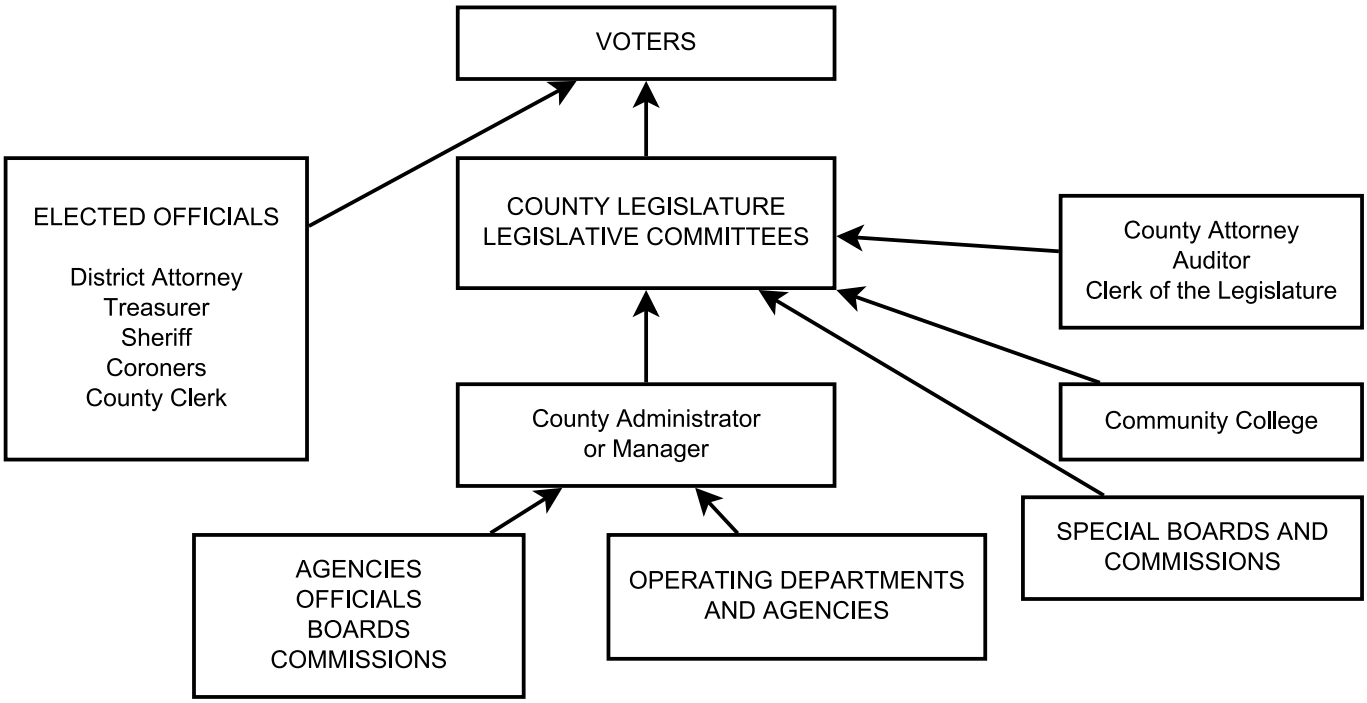

Figure 5.3: County Manager Form Organization Chart

In the large counties, however, urbanization has created a need for new patterns of administration as well as new leadership arrangements. The result has been a rapid growth in both the size and complexity of county administrative structures. These arrangements meet the needs of both ongoing traditional county functions, such as law enforcement and record keeping, as well as the newer county functions in such areas as industrial and economic development, mental health services, and the provision of recreational facilities and programs.

The administrative structures of New York counties generally fall into three categories: (1) organization under the County Law; (2) organization with an elected county executive; and (3) organization with an appointed manager or administrator. As might be expected, there are many similarities among these three forms, but there are also differences. As illustrated in Figure 5.1 [54], Figure 5.2 [54], and Figure 5.3 [55], the primary differences among the three forms are at the top, in the relationship between the elected representative body and how the county is functionally administered. The administrative structure of a county government does not depend on whether the county elects an executive, appoints a manager, or leaves administrative direction and supervision to its legislative body. However, most of the larger counties have found it desirable, if not necessary, to divide their administrative structures into many departments. This organizational structure facilitates proper direction and supervision of what have become large-scale enterprises.

5.5.4 Other Elected and Appointed Officers

In counties organized under the County Law, the following officials must be elected: district attorney, sheriff, coroner(s) and county clerk. Under a home rule charter, a county may alter some of these officers' duties, subject to referendum. The treasurer must also be elected, but this office may be eliminated under either the County Law or a home rule charter.

Many of the charter counties have dropped the office of treasurer and incorporated its functions with those of a director of finance. The office of sheriff, although based in the Constitution, may also be substantially modified. In counties with county police departments, for example, the office of sheriff has few, if any, law enforcement functions, but may retain civil functions and responsibility for operating a county correctional facility.

5.6 The Functions of County Government

At the beginning of this chapter we noted that the principal reasons for creating county governments in the colonial period were to facilitate the defense of the community against enemies and to maintain public order.

With the establishment of state government, the counties provided an already existing and readily available administrative unit through which the state could carry out a number of its functions and duties. To do this, the counties found themselves keeping records on behalf of the state, enforcing state laws and conducting elections for the state, among other state-assigned functions. In New York, as in other states, the prevailing view saw county government as an arm of state government, serving state purposes.

It is doubtful that many residents of the counties of New York ever fully shared this assessment of the nature of the county. The people of the counties appear to have felt from earliest times that the county, like the city, the town and the village, was one of "their" local governments, even though it may have performed duties for the state.

The recent fundamental changes in the nature and form of county government in New York have in some ways brought the legal concept of a county closer in line with the concept held by most of the counties' inhabitants. The impetus for this merger of the de jure with the de facto probably sprang from the rapidly expanding demands for services, which were stimulated by population growth and urbanization, which often could not be supplied by the towns, cities, and villages.

The functions of county government at the beginning of the twenty-first century scarcely resemble those of colonial times, although the county still enforces laws and maintains order. In 1980, total expenditures by county government in New York amounted to $5.5 billion. By 2010, this amount had grown to over $23.1 billion. To see what counties are doing today and to illustrate the demands now being placed on county government, it is useful to examine how county government spends its money. <<county_expenditure_trends_table>> shows the dollar amount and percent distribution of major expenditures for all counties for 1980 and 2010.

SOURCE: Office of the New York State Comptroller

Economic assistance, which includes social services programs such as Medicaid and Aid to Dependent Children, remains the largest category of expenditure for county government. However, the share of the distribution of expenditure for this category has declined as expenditures in other categories have increased and accounting for Medicaid expenditures has changed. In 1980, county expenditures for Medicaid reflected the entire cost of the program (counties paid the full cost and were then reimbursed from state and federal sources). In 2003, however, county medical expenditures reflect only the county contribution (roughly 25 per cent of total Medicaid costs), making comparisons between these years difficult. The greatest percentage of growth in dollar terms has been in the education category, which includes the counties' obligation to pay for the education of pre-school special education children as well as the costs of providing community college education to county residents. Police and public safety has also experienced significant growth and expenditures accounting for the cost of operating a jail in addition to the expenses of a sheriff's department, plus probation and rehabilitation services. General government includes staffing and administrative costs of county officials, the district attorney, public defenders, maintenance of buildings and other central operations.

5.7 Elections

A significant change in voting systems was made with the implementation of the Help America Vote Act of 2002 (HAVA), which required that voting machines and voting systems used in all states meet minimum performance standards, and for the uniform administration of the electoral process, from voter registration to the casting of the ballot. New York State Election Law, Article 7, in part, implements HAVA. One important change is the transfer of ownership of voting systems from each of New York's cities, towns, and villages to each respective County Board of Elections. Prior to this statutory change, with only several exceptions, voting machines were owned by local

municipalities. In the federal election of November 2000, there were 15,571 election districts in New York State. With the exception of voters in approximately 60 election districts, the balance of the state's voters voted on one of the 19,843 lever machines in use at that time. Central count voting systems are owned by the county boards of elections, and are used to count absentee and affidavit optical scan or punch card ballots. In compliance with HAVA, the State Legislature banned punch card absentee systems in 2005, which resulted in the use of a single technology (optical scan system) certified for use in New York. At present, the majority of county boards in the state use central count op-scan central count voting systems.

In 2006, compliance with HAVA and an implementing Federal Court order required the placement of at least one such ballot marking device in each county, though counties could provide more access than just a single device for their entire county. The State Board of Elections certified five ballot marking devices to serve as an interim compliance solution to provide access for voters with disabilities, while New York's efforts at obtaining certification for HAVA-compliant voting systems and ballot marking devices continued. Today, all county boards of elections have implemented certified transparent, accurate and verifiable optical scan poll site voting systems and ballot marking devices throughout the state's 15,005 election districts.

5.8 Transfer of Functions

Article 9, section 1(h)(l) of the State Constitution authorizes alternative forms of county government to transfer functions or duties from one unit of local government to another, subject to referenda approval. Any such transfer, whether included in a proposed county charter or charter amendment, or by local law through procedures set forth in section 33-a of the Municipal Home Rule Law, must be approved by separate majorities in the area of the county outside the cities, and in all cities in the county, if any, "considered as one unit." In addition, if a function or duty is transferred to or from any village, the transfer must also be approved by a majority of voters in all villages so affected, again "considered as one unit."

In many cases, counties have assumed new activities without formal transfer of the function. So long as the county has power to engage in a specific activity — the provision of parks, for example — it often does so at the same time that cities, towns and villages undertake similar activity. This power of the local units to carry out the same activity presents local taxpayers with recurring policy questions regarding which units can perform each service best and at least cost. In many cases cities have urged counties to assume activities, such as oversight of parks, zoos, civic centers and the like, not only to spread the cost more equitably, since all county residents are likely to use such facilities, but also because the county has greater ability to finance such activities.

5.9 Summary

Although the counties still carry out, in one way or another, their original functions and duties, they also have taken on a vast array of new ones. As a result, county governments in New York have had to adapt so that they can provide and finance these services for all the cities, towns and villages within their jurisdiction.

County government has been strengthened as a unit between the cities, towns and villages on the one hand and the state government on the other. The State Legislature and the people of the state have made it possible, through the Constitution and statutes, for the counties to restructure themselves, if they choose, to provide the executive and administrative leadership, the administrative organization and the operational procedures required meeting new demands.

In urban areas, the counties are now major providers of services, and it appears likely that county government will continue to assume new responsibilities.

Chapter 6

City Government

Each of New York State's 62 cities is a unique governmental entity with its own special charter. Two — New York and Albany — have charters of colonial origin, and the other 60 were chartered separately by the State Legislature.

Although home rule was a hard-won prize for the cities of New York State, they now have substantial home rule powers, including authority to change their charters and to adopt new charters by local action. Now New York State contains all of the major forms of city government: council-manager, strong mayor-council, weak mayor-council and commission.

New York City was originally established as a consolidated "regional" government and is now the core of a vast metropolitan region which sprawls over large areas of Connecticut and New Jersey as well as New York. In response to swift-moving social and economic changes the government of New York City has undergone important changes in both structure and allocations of authority.

When the Dutch West India Company granted what roughly amounted to a charter to New Amsterdam in 1653, it established the first city organization in the future state. New Amsterdam operated as an arm of a "higher government." The provincial governor — Peter Stuyvesant, at the time — appointed local officials. These magistrates were then granted the power to choose their successors. However, Stuyvesant reserved the right to promulgate ordinances.

The charters granted to New York City and Albany by English Governor Thomas Dongan in 1686 gave these cities more privileges and authority which they could exercise independently of the colonial government.

The first State Constitution, adopted in 1777, recognized the existing charters of New York and Albany and authorized the Legislature "…to arrange for the organization of cities and incorporated villages and to limit their power of taxation, assessment, borrowing and involvement in debt." Since that time separate special legislative acts have been necessary to establish each new city, although later developments permitted cities to replace or amend their charters by local action.

By 1834, six new cities had been chartered along the state's principal trading route, the Hudson-Mohawk arterial between New York City and Buffalo. These new cities were Brooklyn, Buffalo, Hudson, Rochester, Schenectady and Troy. Thirty-two more cities were created between 1834 and 1899, as thousands of immigrants were attracted to the state. The most recently chartered city in New York is the City of Rye, which came into being in 1942.

6.1 What is a City?

Historically, the need to provide services for population centers prompted the creation of cities. Beyond that common factor, it is difficult to ascertain common purposes or to generalize about their structures, charters granted to cities in New York differ widely.

No general law provides authority for the incorporation of cities; there is no statutory minimum size, either in population or geographical area, which must be met for an area to become a city. Furthermore, there is no concept of progression from village to city status. The primary difference between a city and a village is that the organization and powers of cities is set out in their own charters, while most villages are organized and governed pursuant to provisions of the Village Law. Also, unlike a city, a village is part of a town, and its residents pay town taxes and receive town services.

The Legislature may incorporate any community of any size as a city. In fact, most of the state's 62 cities have populations smaller than the population of the largest village, whereas over 150 of the state's 544 villages have populations greater than that of the smallest city. As a practical matter, the State Legislature does not create cities without clear evidence from a local community that its people desire incorporation. This evidence ordinarily is a locally drafted charter submitted to the Legislature for enactment and a home rule message from local governments that would be impacted by the incorporation.

6.2 Home Rule and the Cities — Historical Development

Historically, the Legislature enacted a charter to meet the specific needs of a center of population. As these centers grew, expanded and experienced changing needs, these charters were amended by special acts of the Legislature. Later on, cities gained the authority to revise and adopt new charters without the approval of the State Legislature. As a result, there is little uniformity in city charters throughout the state, as each city has, by trial and error, determined for itself what it believes to be the most effective form of government.

New York cities, as instrumentalities created individually by the Legislature, struggled long and hard for greater authority to manage their own affairs as they saw fit. Not until the late 1800's did the Legislature begin to legislate for cities generally rather than passing specific laws on individual local matters.

In 1848, the State Constitution was amended to ensure the integrity of elections of local officials. Prior to this time, there had been continual battles between the State and the cities of New York and Brooklyn over state-imposed changes of local officials who had been elected by city voters. The state would regularly move in and appoint local officials, thereby nullifying local elections. After 1848 the state could no longer do this, and in 1854 the mayor of New York City demanded, and at last received, authority to appoint his agency heads.

Despite such changes, however, cities often were subjected to legislative intervention. In 1857, for example, the Legislature created a new police force in New York City and Brooklyn because of allegations of police corruption. Nine years later the state temporarily took over New York City's health and excise departments, despite a court battle by the mayor.

Municipal home rule was a major issue at the Constitutional Convention of 1894. The Constitution of 1894, as amended in Article 12, section 2, divided cities into three classes by population: First Class — 250,000 or over; Second Class— 50,000 to 250,000; and Third Class — under 50,000. This classification was intended to provide a scheme whereby the Legislature could legislate for municipalities by passing general laws and still meet the particular problems of each type of city. It was actually a compromise between those favoring regulation of particular city affairs through special laws, and those favoring the covering of all communities in one general scheme of regulations. In addition, provision was made to require that any law not applicable to all the cities in a class had to be submitted for approval to the mayors of the cities affected by it. If the mayors disapproved, the law was returned to the Legislature for reconsideration. In practice, however, mayoral vetoes seldom were overridden. In 1907 a Constitutional amendment altered the classification of cities so that all cities with a population over 175,000 became First Class. This, of course, narrowed the population range of Second Class cities.

Over the years, the Legislature has enacted a number of major general laws affecting cities. The General Municipal Law enacted in 1892 covered cities as well as other forms of local government. The General City Law of 1909 applied specifically to cities. It granted certain powers to cities generally, and at the same time regulated their

administration. In 1913 the General City Law was amended to grant to each city the power "…to regulate, manage, and control its property and local affairs…" as well as "…the rights, privileges and jurisdiction necessary and proper for carrying such power into execution." [1]

The General City Law also granted specific powers in a number of areas, such as construction and maintenance of public works, expenditure of public funds, provision of pensions for public employees and, by an amendment in 1917, zoning. This legislation, which is still in effect, authorizes cities to implement these powers by enacting ordinances. Since the enactment of the Municipal Home Rule Law in 1964, all of these powers may also be exercised by local law.

6.3 Home Rule and the Cities — In the 1900s

Attempts by the State Legislature to address the question of city government structure included the Second Class Cities Law of 1906 and the Optional City Government Law of 1914. The Second Class Cities Law, which in effect provided a uniform charter for cities of the second class, is still operative for cities that were cities of the second class on December 31, 1923.

The way was opened in 1923 for cities to establish by local charter the form of government they wished, for in that year the voters approved a Home Rule Amendment to the Constitution and the Legislature enacted a City Home Rule Law. These actions spelled out the power of cities to amend their charters or adopt new charters by local law, without going to the Legislature. Under the Home Rule Amendment cities also were empowered to enact local laws dealing with their "property, affairs or government" as long as these laws were not inconsistent with the Constitution or general laws of the state. The Legislature was specifically prohibited from legislating on these matters, except through general laws affecting all cities alike. The tripartite constitutional classification of cities was abolished, except as it applied to the second class cities then in existence. The provisions of the City Home Rule Law were incorporated without substantial changes into the present Municipal Home Rule Law when it was enacted in 1964.

Abolition of the classification of cities in the 1923 constitutional amendment raised questions concerning the terms first, second and third class cities, which in some cases still exist. Since 1894 many statutes have referred to one or more of these designated classes of cities. Although most of these laws have been amended, revised or repealed, some are still in effect and statutes using these terms of classification have been enacted since 1923. Although it has been generally agreed that these statutes are constitutional, the problem arises as to how to interpret the classifications in the absence of a constitutional definition. References to classes of cities occurring in statutes passed prior to January 1924 are interpreted under the assumption that the statute effectively incorporated the constitutional classification which was in effect on the effective date of the statute. With respect to laws passed after 1924, the approach to interpretation is less clear. Often it is assumed that each class means what it had come to mean through prior usage.

6.4 The Forms of City Government

A city's charter forms the legal basis for the operation of the city. The charter enumerates the basic authority of the city to govern, establishes the form of government, and sets up the legislative, executive and judicial branches of city government.

Each city has enacted and amended various ordinances and local laws over time and has often codified these enactments into a code of ordinances and/or local laws. Together, the charter and code prescribe the method and extent to which a city carries out its legal powers and duties.

[1] General City Law §19, added by Chapter 247 of the Laws of 1913.

Because all cities have separate charters granted by the State Legislature and all now have the power to revise their charters by local action, it is difficult to describe a common city structure. All cities have elected councils, but elections are by wards, at large, or a combination of the two. Most cities have mayors; some mayors are elected at large by the voters, while others are selected by the council. Otherwise, city government in New York exhibits a variety of forms. In general, city government falls into four broad categories:

- council-manager, under which an appointed, professional manager is the administrative head of the city, the council is the policymaking body and the mayor, if the position exists, is mainly a ceremonial figure. The manager usually has the power to appoint and remove department heads and to prepare the budget, but does not have a veto power over council actions;
- strong mayor-council, under which an elective mayor is the chief executive and administrative head of the city, and the council is the policy making body. The mayor usually has the power to appoint and remove agency heads, with or without council confirmation; to prepare the budget; and to exercise broad veto powers over council actions. This form sometimes includes a professional administrator appointed by the mayor and is then called the "mayor-administrator plan;"
- weak mayor-council, under which the mayor is mainly a ceremonial figure. The council is not only the policy making body, it also provides a committee form of administrative leadership. It appoints and removes agency heads and prepares budgets. There is generally no mayoral veto power; and
- commission, under which commissioners are elected by the voters to administer the individual departments of the city government and together form the policy making body. In some cases one of the commissioners assumes the ceremonial duties of a mayor, on a rotating basis. This plan sometimes includes a professional manager or administrator.

All of these types of city government are found in New York State. Thirteen of the 62 cities have council-manager arrangements; three utilize the commission plan, one of which also has a city manager. The remaining 46 cities have the mayor-council form, three of which also have a city administrator; their governments are located at various points along a continuum between strong mayor and weak mayor. Within each group there are many hybrids. See Table 6.1 [62] for a listing of cities, their 2010 populations and their forms of government.

No new weak mayor-council or commission forms of city government have been adopted in recent years, although two cities with the council-manager form have switched to the mayor-council form. At present, the strong mayor-council form is the most popular form of city government in this New York.

Table 6.1: Form of City Government.[2]

City	Population 2010 Census	Rank	Form of Government	Council Members
Albany	97,856	6	Mayor-Council	16
Amsterdam	18,620	33	Mayor-Council	5+Mayor
Auburn	27,687	24	Mayor-Council-Manager	4+Mayor
Batavia	15,465	40	Council-Manager	9
Beacon	15,541	39	Mayor-Council-Administrator	6+Mayor
Binghamton	47,376	14	Mayor-Council	9
Buffalo	261,310	2	Mayor-Council	12
Canandaigua	10,545	51	Mayor-Council-Manager	8+Mayor
Cohoes	16,168	36	Mayor-Council	6+Mayor[3]

Table 6.1: (continued)

City	Population 2010 Census	Rank	Form of Government	Council Members
Corning	11,183	49	Mayor-Council-Manager	10+Mayor
Cortland	19,204	32	Mayor-Council	8+Mayor[4]
Dunkirk	12,563	46	Mayor-Council	5
Elmira	29,200	21	Mayor-Council-Manager	6+Mayor
Fulton	11,896	47	Mayor-Council	6+Mayor
Geneva	13,261	45	Mayor-Council-Manager	8+Mayor
Glen Cove	26,964	26	Mayor-Council	6+Mayor
Glens Falls	14,700	42	Mayor-Council	6+Mayor[5]
Gloversville	15,665	38	Mayor-Council	12+Mayor[6]
Hornell	8,563	56	Mayor-Council	10+Mayor[7]
Hudson	6,713	58	Mayor-Council	11
Ithaca	30,014	20	Mayor-Council	10+Mayor[8]
Jamestown	31,146	19	Mayor-Council	9
Johnstown	8,743	55	Mayor-Council	5+Mayor[9]
Kingston	23,893	28	Mayor-Council	10
Lackawanna	18,141	35	Mayor-Council	5
Little Falls	4,946	61	Mayor-Council	8+Mayor[10]
Lockport	21,165	30	Mayor-Council	8+Mayor[11]
Long Beach	33,275	16	Council-Manager	5
Mechanicville	5,196	60	Mayor-Commission	4+Mayor
Middletown	28,086	23	Mayor-Council	9
Mount Vernon	67,292	8	Mayor-Council	5
New Rochelle	77,062	7	Mayor-Council	6+Mayor
New York	8,175,133	1	Mayor-Council	51
Newburgh	28,866	22	Mayor-Council-Manager	4+Mayor
Niagara Falls	50,193	12	Mayor-Council-Administrator	7
North Tonawanda	31,568	18	Mayor-Council	5
Norwich	7,190	57	Mayor-Council	6+Mayor[12]
Ogdensburg	11,128	50	Mayor-Council-Manager	6+Mayor
Olean	14,452	43	Mayor-Council	7
Oneida	11,393	48	Mayor-Council	6+Mayor[13]
Oneonta	13,901	44	Mayor-Council	8+Mayor[14]
Oswego	18,142	34	Mayor-Council	7
Peekskill	23,583	29	Mayor-Council-Manager	6+Mayor
Plattsburgh	19,989	31	Mayor-Council	6+Mayor
Port Jervis	8,828	54	Mayor-Council	9
Poughkeepsie	32,736	17	Mayor-Council-Administrator	8
Rensselaer	9,392	53	Mayor-Council	10

Table 6.1: (continued)

City	Population 2010 Census	Rank	Form of Government	Council Members
Rochester	210,565	3	Mayor-Council	9
Rome	33,725	15	Mayor-Council	7
Rye	15,720	37	Mayor-Council-Manager	6+Mayor
Salamanca	5,815	59	Mayor-Council	5+Mayor
Saratoga Springs	26,586	27	Mayor-Commission	4+Mayor
Schenectady	66,135	9	Mayor-Council	7
Sherrill	3,071	62	Mayor-Commission-Manager	5
Syracuse	145,170	5	Mayor-Council	10
Tonawanda	15,130	41	Mayor-Council	5
Troy	50,129	13	Mayor-Council	9
Utica	62,235	10	Mayor-Council	10
Watertown	27,023	25	Mayor-Council-Manager	4+Mayor
Watervliet	10,254	52	Mayor-Council-Manager	2+Mayor
White Plains	56,853	11	Mayor-Council	6+Mayor
Yonkers	195,976	4	Mayor-Council	7

The comparatively greater frequency of the mayor-council form among New York cities can probably be attributed to both historic and socio-economic factors. The council-manager form occurs more frequently in younger cities of a more homogeneous composition found in the Midwest and the Far West. New York cities tend to be older than those in other parts of the country and tend to have more heterogeneous populations. In such cities the mayor-council form, especially with a strong mayor, has been more prevalent.

6.5 Contents of City Charters

Although cities have the home rule power to revise their charters and adopt new charters, this authority is not unlimited, and must be exercised in accordance with the State Constitution and the Legislature's grant of local law

[2] 2010 U.S. Census. Source: U.S. Bureau of the Census. Prepared by Empire State Development Corporation. Form of Government and Council Members reported by NYCOM 2007 Directory of City and Village Officials

[3] Mayor may only vote when there is a tie

[4] Mayor may only vote when there is a tie

[5] Mayor may only vote when there is a tie

[6] Mayor may only vote when there is a tie

[7] Mayor may only vote when there is a tie

[8] Mayor may only vote when there is a tie

[9] Mayor may only vote when there is a tie

[10] Mayor may only vote when there is a tie

[11] Mayor may only vote when there is a tie

[12] Mayor may only vote when there is a tie

[13] Mayor may only vote when there is a tie

[14] Mayor may only vote when there is a tie

powers to cities. Cities act by law, which include adopting and amending charters that are not inconsistent with the State Constitution and are not inconsistent with any general law of the State. A city may act in the interest of good government, its management and business, the protection of its property, and the health, safety and welfare of its inhabitants.

Generally, city charters address the following topics:

- Name of the city
- Boundaries
- Wards, districts, or other civil subdivisions
- Corporate powers
- Fiscal year
- Legislative body, e.g., City Council, Common Council, Board of Aldermen
- Legislative powers
- Composition
- Meetings
- Rules of procedure
- Chief Executive
- Mayor
- Veto power/legislative override Power of appointment
- City Manager
- Corporation Counsel or City Attorney
- City Clerk
- Departments, offices, agencies and commissions
- Budget - financial procedures
- Tax administration

6.6 Decentralization and Urban Problems

Today New York State has 62 cities, ranging in population from 3,071 to over 8,000,000. There are 30 cities with a population of more than 20,000, including 13 with more than 50,000. Their geographic areas range from 0.9 to 303.7 square miles.

The problems of the large cities in the state reflect many complex elements of social change, but population changes are often seen as both cause and effect. All of the state's large cities experienced rapid growth between 1900 and 1930. In those 30 years the populations of the six largest cities increased 98 percent — from 4,202,530 to 8,303,038 — an increase from 58 percent to 66 percent of the state's total population. This surge in population was accompanied by a corresponding development in city facilities and services. The vast New York City Transit

System was built, for example, and all cities built schools, roads, libraries, sewers, water systems, parks and a great array of other facilities to accommodate the needs and demands of their burgeoning populations.

This rapid growth tapered off during the depression decade between 1930 and 1940, and came to a halt in the 30 years from 1940 to 1970. In the period from 1970 to 1990 most cities experienced a population decline, and census estimates indicate that this trend has continued through the 2010's. The population of New York City dropped nearly 11 percent during the period from 1970 to 1980, but had recovered nearly half this loss by 1996. During the same period, the collective population of the next five largest cities declined by nearly 23 percent.

The stabilization and subsequent decrease of population in the central cities has been accompanied by growth in the surrounding suburban communities. Following closely on the heels of the residential shift to the suburbs has been a decentralization of commerce and industry. Economic considerations have prompted businesses to turn to the suburbs in search of more and cheaper space for expansion. The cost savings, coupled with the shift of the labor supply, have made it increasingly more attractive for industry to locate outside the central cities.

A transformation has occurred over the years in the characteristics of the urban population. City populations generally include a comparatively large proportion of immigrants, persons of lower incomes and persons in the youngest and oldest age groups (under 5 and over 65).

6.7 New York City

Although New York City is the oldest city in the country's 13 original states, its present city government is just over a century old. The city was assembled from a number of other counties, cities, towns and villages by the State Legislature after a more than 30-year effort by advocates of consolidation. The result of this governmental reorganization was the creation of five boroughs coterminous with county boundaries and the assembling of all five into the City of New York.

The present City of New York, the land area of which has remained basically unchanged since its consolidation in 1898, covers more than 303 square miles. Its population of over eight million is greater than that of 38 of the 50 states.

New York has been the most populous city in the United States since 1810. It currently has almost as many residents as the combined population of the next two most populous cities in the country. The city's 2010 Census population was 8,175,133.

The 42 percent of New York State's citizens who reside in New York City live in the only consolidated major local government in the state. There are five counties but no county governments. The area of the city contains no villages, no towns and no sub-city self-governing units.

In addition to the mayor, a comptroller and a public advocate are elected citywide. The council is composed of the public advocate and 51 council members, each of whom represents a council district.

In recent years, New York City has experimented with various forms of decentralization to meet a rising tide of objections from city residents that the government had become too remote and inaccessible. The most significant decentralization development has been the creation of 59 community boards.

6.7.1 The Mayor

The mayor serves as the chief executive officer of the city, and with the assistance of four deputy mayors, presides over many departments, offices, commissions and boards. The mayor may create, modify or abolish bureaus, divisions or positions within the city government. The mayor, who may be elected to serve a maximum of two four-year terms, is responsible for the budget and appoints and removes the heads of city agencies and other non-elected officials.

6.7.2 The Comptroller

The comptroller, who may be elected to serve a maximum of two four-year terms, serves as the chief fiscal officer of the city. The Comptroller advises the mayor, City Council and public of the city's financial condition, and makes recommendations on city programs and operations, fiscal policies, and financial transactions. The Comptroller also audits and examines all matters relating to the finances of the city, registers proposed contracts, verifies budget authorization and codes for contracts, determines credit needs, terms and conditions, prepares warrants for payment, issues and sells city obligations, is responsible for a post-audit, and is an ex officio member of numerous boards and commissions, most notably the board of estimate. The comptroller may investigate any financial matter, administer sinking funds, keep accounts and publish reports. The Governor may remove the comptroller, but only on charges after a hearing.

6.7.3 The Public Advocate

The public advocate is elected to a four-year term to represent the consumers of city services, in addition to presiding over meetings of the City Council. The public advocate may sponsor local legislation, is an ex officio member of all council committees, and may participate in council discussions but may not vote unless there is a tie. The public advocate reviews and investigates complaints about city services, assesses whether agencies are responsive to the public, recommends improvements in agency programs and complaint handling procedures, and serves as an ombudsman for people who are having trouble obtaining the service they need from city agencies.

6.7.4 The Council

The City Council is the city's legislative body. It has the power to enact local laws, including amendments to the city charter and the administrative code, originate home rule messages, and adopt capital and expense budgets. Members, who represent districts, are elected for a term of four years. In addition to its legislative role and oversight powers over city agencies, the Council approves the city's budget and has decision-making powers over land use issues.

6.7.5 The Borough Presidents

The five borough presidents, who are the executive officials of each borough, are also elected to four-year terms. The borough presidents' chief responsibilities involve working with the Mayor to prepare the executive budget and propose borough budget priorities directly to the Council, review and comment on major land use decisions and propose sites for City facilities within their boroughs, monitor and modify the delivery of City services within their boroughs, and engage in strategic planning for their boroughs.

6.7.6 Borough Board

Each borough has a Borough Board consisting of the Borough President, the district council members from the borough, and the chairperson of each community board in the borough.

6.7.7 Community Boards

The 59 community boards play an advisory role in zoning, other land use issues, community planning, the city budget process, and coordinating municipal services. Each board comprises up to 50 unsalaried members, appointed by the borough president in consultation with the City Council members who represent any part of the board district.

6.7.8 The Metropolitan Transportation Authority

One of the most important governmental agencies in the New York City area is the Metropolitan Transportation Authority (MTA). This agency was established by the State Legislature to provide mass transportation services within and to the City of New York, including the subway and all public bus systems, as well as the commuter systems of the Long Island Rail Road, Long Island Bus and the Metro-North Railroad. The Metropolitan Transportation Authority is also responsible for several bridges and tunnels. The Governor, with Senate advice, appoints the MTA Board which consists of a Chairman, Chief Executive Officer and 18 other members.

6.7.9 New York Metropolitan Transportation Council

The council is the official metropolitan planning organization for the New York metropolitan area, composed of elected officials, and transportation and environmental agencies.

The council is composed of nine members representing the principal jurisdictions involved in transportation planning in the downstate area: the county executives of Nassau, Putnam, Rockland, Suffolk and Westchester counties; the chairman of the New York City Planning Commission and the commissioner of the New York City Department of Transportation; the chairman of the Metropolitan Transportation Authority; and the commissioner of the New York State Department of Transportation (the permanent co-chairperson of the council). The advisory (nonvoting) members include representatives of the Port Authority of New York and New Jersey, the U.S. Department of Transportation's Federal Highway Administration and Federal Transportation Administration, the U.S. Environmental Protection Agency and the NYS Department of Environmental Conservation. The chair is shared by the NYS transportation commissioner and one other council member elected annually.

The council coordinates transportation planning in the metropolitan area, prepares travel-related forecasts for personal transportation, serves as a cooperative forum for regional transportation issues, and collects, analyzes and interprets travel-related data. Major projects include the five-year Transportation Improvement Program and a long-range transportation plan for the region.

Chapter 7

Town Government

Town government in New York can be traced to both New England and Dutch colonial government arrangements in the Hudson Valley. The state's towns encompass all territory within the state except territory within cities and Indian reservations. In size, they are the most diverse of all the units of local government.

Towns existed independently in the colonial period. When New York became a state, towns were generally regarded as creations of the State Legislature that existed to serve state purposes. Town governments now, however, have long been recognized as primary units of local government. They possess authority to provide virtually the full complement of municipal services. By statutory and constitutional adjustments, towns are flexible units that can function as rural or as highly urbanized general purpose units of government, depending on local needs.

Everyone in New York who lives outside a city or an Indian reservation lives in a town. There are more towns in New York than there are cities and villages combined.

In New York, "town government" includes both the Town of Hempstead in Nassau County, with a 2010 population of 759,757, almost three times that of the City of Buffalo and taxable real property of over $115 billion, and the Town of Red House in Cattaraugus County with 38 residents and a taxable real property of $88 million. Between these two extremes are 930 other towns, some of which provide to their residents a great number of municipal services, while others do little more than maintain a few rural roads.

7.1 The Beginnings of Town Government

Town government in New York has both Dutch and English roots, with even earlier antecedents in the Germanic tribes — the English word "town" is derived from the Teutonic "tun," meaning an enclosure.

The Dutch communities established in the Hudson Valley in the early seventeenth century were easily integrated with the strong, tightly knit version of town government brought a few years later by immigrants from Massachusetts and Connecticut to the eastern shores of Long Island. In 1664, Charles II claimed the territory between the Connecticut and the Delaware rivers by right of discovery and conveyed it to the Duke of York. His agent, Colonel Nicolls, armed with a commission as Governor, appeared with a fleet off the shore of New Amsterdam, and the Dutch quickly capitulated.

Immediately after they established British sovereignty in New York in 1664, the English began to more fully develop the patterns of local government. Issued in 1665, the Code of Laws, known as the "Duke's Laws," confirmed the boundaries of 17 existing towns and provided for basic organization of the town governments. These laws gave freeholders the right to vote and provided for a town meeting system resembling one that is still used in New England.

Town government continued to develop throughout the remainder of the Seventeenth and into the Eighteenth Century. A town court system grew up. Provision was made for a chief fiscal officer, known as a town treasurer, a forerunner of the present supervisor. In 1683 the first general property tax was imposed. In 1703 provision was made for a system of highways.

The State Constitution of 1777 recognized the existence of 14 counties and some towns. The Constitution provided that "it shall be in the power of the State Legislatures of this State for the advantages and conveniences of the good people to divide the same into such other and further counties and districts as it may then appear necessary." Between 1788 and 1801, the Legislature was especially active in dividing counties into towns. However, the form of town government remained essentially the same as it had been under British rule.

In the early decades of the Nineteenth Century, town government began to assume a more modern form. In the Ninth Edition of the Revised Statutes of New York, laws affecting towns were segregated in Chapter 20 of the General Laws. This chapter was the immediate predecessor of the Town Law. The title "Town Law" appears to have been used first in its modern sense when laws affecting towns were re-codified by Chapter 569 of the Laws of 1890 and made applicable to most towns, with certain exceptions. In 1909, another re-codification grouped statutes applicable to towns into Chapter 62 of the Consolidated Laws.

Despite these re-codifications, the Town Law still contained general statutes and special acts which duplicated each other. In 1927 a Joint Legislative Committee set about to re-codify the Town Law once again. The result is the present Town Law, which is Chapter 634 of the Laws of 1932.

7.2 Characteristics of Towns

7.2.1 Geography

Towns and cities encompass all the lands within the state, except Indian reservations, which have special legal status. The 932 towns in the state vary greatly in size, ranging from the Town of Webb in Herkimer County (which is larger than 11 counties and covers 451.2 square miles) to the Town of Green Island in Albany County (which covers only 0.7 of a square mile.)

Towns are not distributed equally among the counties. Nassau County, with a population of 1, 339, 532 in 2010, being the second most populous county outside New York City, has only three towns, while Cattaraugus County, with a population of 80,317 (less than one-sixteenth of Nassau County's population), contains 32 towns.

7.2.2 Legal Status

Courts have determined that towns are true municipal corporations. Previously the courts had ruled that towns were: "…involuntary subdivisions of the state, constituted for the purpose of the more convenient exercise of governmental functions by the state for the benefit of all its citizens" (Short v. Town of Orange, 175 A.D. 260, 161 N.Y.S., 466, (1916)). Town Law definition now confirms that towns are municipal corporations:

> "A town is a municipal corporation comprising the inhabitants within its boundaries, and formed with the purpose of exercising such powers and discharging such duties of local government and administration of public affairs as have been, or, maybe conferred or imposed upon it by law." (section 2, Town Law)

Towns were finally granted full membership in the local government partnership when, in 1964, they were constitutionally granted home rule powers (see Chapter IV).

7.2.3 Development — Rural to Suburban

Physical development came to towns before their emergence as municipal corporations. Indeed, the pressing needs arising from physical development gave impetus to their legal development. For many years towns provided only basic government functions such as organizing and supervising elections, administering judicial functions, and constructing and maintaining highways. In carrying out these governmental functions, towns served their own needs while also carrying out the state's purposes. The elective machinery took care of maintaining local political organizations as well as giving town officials contact with, and an element of control or influence in, county, state and federal political organizations. The local judicial function, in conjunction with the police function of county sheriffs and state police or military agencies, gave security to the people of the towns. Control of highways assured residents of rural towns that they would maintain contact with their neighbors and distant urban centers and that they would be able to market their crops.

Even in rural areas, however, increasing population and its clustering into hamlets gave rise to needs for services not available at the town level. Towns required all-weather roads to assure year-round access to shops, sidewalks to protect pedestrians, public water to protect public health, sewers to carry waste away, and police to protect growing populations and increasingly valuable property.

The flight of city dwellers to the suburbs, which began as early as the second decade of the twentieth century, resulted in a continuous, almost geometric growth in town population. From 1950 to 2010, the population living in towns in New York State increased by 130 percent, while the population of cities decreased by 29 percent (excluding New York City). While the past three decades have seen a significant slowdown in this shift, an increasing proportion of the total outward migration during this time period has settled in more rural (as opposed to suburban) towns. New town-dwellers, whether suburban or rural, have demanded many of the services they had been accustomed to in the cities —water, sewage disposal, refuse collection, street lighting, recreational facilities and many more. Since suburban development in many cases was formless and without identifiable business centers, village incorporation often proved problematic. The suburban challenge has fallen upon town government, a challenge to develop services where they were needed without losing the traditional role as the most local of local governments.

7.3 Government Organization

7.3.1 Classification of Towns

The Town Law divides towns into two classes based on population. All towns of 10,000 or over in population as shown by the latest federal decennial census, with the exception of towns in Suffolk and Broome Counties and the towns of Ulster and Potsdam, are by statute towns of the first class. All towns in Westchester County, regardless of population, are towns of the first class.

In addition, any town may become a town of the first class by action of the town board, subject to a permissive referendum, if it:

- has a population of 5, 000 or more, as shown in any federal census (not necessarily decennial);
- has an assessed valuation over $10 million; or
- adjoins a city having a population of 300, 000 or more.

All towns which are not first class towns are towns of the second class. Under the Town Law, there are organizational differences between first class and second class towns. The elected officers of a first class town are its supervisor, four council persons (unless increased to six or decreased to two as provided by the Town Law), town

clerk, two town justices, highway superintendent, and a receiver of taxes and assessments. Voters in second class towns, on the other hand, elect the supervisor, two councilpersons, two justices of the peace, a town clerk, a highway superintendent, three assessors and a collector.

In 1962, the Legislature created the additional classification of "Suburban Town." Suburban Towns must be towns of the first class, and must:

- have a population of at least 25, 000; or
- have a population of at least 7, 500, be within 15 miles of a city having at least 100,000 population, and have shown specified growth in population between the 1940 and 1960 decennial censuses.

Provided a town meets the above criteria, it may become a Suburban Town at the option of the town board, subject to permissive referendum.

When the classes of towns were originally authorized, there was a fairly clear-cut differentiation between the powers allotted to the different classes. As town powers were broadened, differences in powers among classes became less clear. For example, the Constitutional Home Rule Amendment in 1964 granted to all towns the local law powers formerly possessed only by Suburban Towns. Even organizational differences have become less sharply defined over time. For example, legislation enacted in 1976 granted all towns the authority to create and/or abolish elective as well as appointive offices and to restructure the administrative agencies of town government by local law. Formerly, only Suburban Towns had specific authority to departmentalize town government operations. To all intents and purposes, all towns, regardless of their statutory classification, possess roughly equivalent legal powers.

7.3.2 Legislative Leadership

The legislative body of the town is the town board. Historically, the town board consisted of the supervisor and the town justices of the peace. The dual status of justices of the peace (now designated as town justices) as judicial and legislative officers has always concerned students of government, but this was accepted in rural towns because it was less expensive than separate offices. When classification of towns was introduced, the judiciary was completely separated from the legislative branch in towns of the first class.

In 1971, the Town Law was amended to allow town boards in towns of the second class to exercise the option of removing town justices from the town board and electing two additional town councilpersons. In 1976, the Legislature amended the Town Law once again, separating the legislative and judicial functions in all town governments by removing town justices from town boards.

One of the distinguishing features of town government organization is the lack of a strong executive branch. Virtually all of a town's discretionary authority rests with the town board. What little executive power the supervisor has is granted by specific statute or by the town board. The town board, therefore, exercises both legislative and executive functions. This situation is not very different from the basic form of government prescribed by state law for counties, cities and villages. What is different, however, is that until recently, towns did not possess the same degree of home rule powers granted to the other units of government to change the basic prescribed forms of government.

It was not until 1964 that home rule was extended to towns. It had previously been extended to villages with a population in excess of 5, 000 and to counties and cities. While the extension of home rule powers to towns was a step forward in the evolution of towns to the status of full-fledged municipal corporations, towns were still generally bound by a much greater number of specific statutory directives than were counties, cities and villages.

Many of these directives fall within the constitutional definition of "general law," which could not be superseded by exercising home rule power. In this respect towns suffered in comparison to counties, cities and villages, each

of which possessed extensive grants of authority to adopt a structure of government through the home rule process suitable to their individual needs. In 1976, the Legislature remedied the situation by authorizing towns to supersede certain provisions of the Town Law relating to the property, affairs or government of the town, notwithstanding the fact that they are "general laws" as defined by the Constitution. This grant of powers can be viewed as a major expansion of home rule powers for towns, for it equipped them with powers similar to those enjoyed by other units of local government.

7.3.3 Executive Leadership

7.3.3.1 Supervisor

The Town Law does not provide for a separate executive branch of town government. Because the supervisor occupies the leader's position on the town board, and because town residents often turn to the supervisor with their problems, many people think the supervisor's position is the executive position of town government. But the supervisor is part of the legislative branch and acts as a member and presiding officer of the town board. He or she acts as a full member of the board, voting on all questions and having no additional tie-breaking or veto power.

The supervisor is more of an administrator than an executive. The supervisor's duties under law are to:

- act as treasurer and have care and custody of monies belonging to the town;
- disburse monies;
- keep an accurate and complete account of all monies;
- make reports as required;
- pay fixed salaries and other claims; and
- lease, sell, and convey properties of the town when so directed by the town board.

The basic source of the supervisor's power lies in the position's traditional political leadership and the holder's ability to use this leadership. Familiarity with day-to-day problems of the town often enables the supervisor to influence the policy decisions of the town board.

In 1938, provision was made in the Town Law for a town manager form of government, which would have made possible greater executive coordination of town functions. TThe provisions were repealed in 1957. However, in 1972, the State Legislature enacted special legislation authorizing the Town of Fallsburg to adopt a town manager plan. Then, in 1976, Article 3-B of the Town Law was enacted, once again enabling any town, by local law, to establish a town manager form of government. Since 1998, the Towns of Collins, Erwin, Mount Kisco, Putnam and Southampton have been operating under a town manager form of government.

By delegating a few more specific powers, the Suburban Town Law gives the supervisor a bit more authority. Although designated as "chief executive officer", the Suburban Town supervisor has no major new executive powers.

As noted earlier, the Legislature has authorized towns to adopt local laws superseding many specific provisions of the Town Law. The purpose of this legislation was to allow towns to restructure their form of government to provide for an executive or administrative branch separate and apart from the legislative branch of government. Offices such as town executive and town manager may be established and granted powers similar to those granted by counties, cities and villages to the offices of county executive or manager, city mayor or manager, and village mayor or manager.

In addition, section 10 of the Municipal Home Rule Law authorizes local governments to enact local laws relating to the powers, duties, qualifications, number, mode of selection and removal, and terms of office of their officers

and employees. Where it is constitutionally permissible, some offices which are elective by statute may be made appointive by local law. Conversely, offices which are appointive by statute may be made elective by local law. Both types of local laws require public referenda. A town may also change the term of office of any of its officers by local law.

7.3.4 Judicial

The state's judicial system has been described in Chapter 3 [21]. As was pointed out earlier, town justices were originally members of the town board, but uneasiness over this duality of functions led to the gradual phasing out of their legislative roles. Also, to enhance the level of professionalism of local justices, state law now mandates their training. The jurisdiction of the town court system is town-wide, even extending to village territory where it is coincident with that of village courts. The cost of the town judicial system is a town-wide charge.

7.4 Operations and Services

The operational organization of towns displays the same lack of sharp definition encountered in the legislative, executive and judicial branches of town government. Although there has been de facto departmentalization by many towns, and formal departments have been created in some instances, by specific statutory authorization or by home rule enactments, there is no general provision for departmental organization.

It is useful to differentiate the town operational structure into two general categories: 1. services provided and functions performed on a town-wide basis, including services to villages; and 2. those provided to part of the town, either to the entire area of the town outside existing villages (the "TOV") or to a specific district or area of the TOV.

7.4.1 Town-wide Organization and Services

Towns first emerged to carry out general governmental functions as distinguished from "proprietary" functions. These general functions cover the basic town-wide services still provided by the town; the operational costs are imposed town-wide. Through the years some services have been added, including those which may be carried out by a town within the territory of a village, either on a cooperative basis or with the consent of the village.

7.4.1.1 Elective Processes

One of the primary functions provided by towns on a town-wide basis is the organization and supervision of elections. The individual election district is the primary element in the election machinery. Towns, in all except Monroe, Nassau and Suffolk Counties, must establish and operate all election districts outside cities. In these districts all inspection clerks and election employees are appointed by the town board upon recommendation from the organized political parties. Party organization is also built around the election district. Party committee members, elected in each election district, form the backbone of town, county and state committees. It is likely that a town's greatest strength in maintaining and promoting its place in the governmental scheme of things rests with the electoral function. This strength can be brought to bear whenever the towns seem about to lose power to other units of government.

Representative democracy has traditionally been achieved in almost all towns through the system of electing town board members as at-large representatives. Towns of the first class (generally, towns with a population of 10,000 or more, or those towns with a smaller population that have chosen to become towns of the first class pursuant to

Town Law sections 12 and 81) usually elect a Town Supervisor and four town board members as the town legislative body, separate from other elective or appointive town offices such as clerk, justice and assessor.

Under the current at-large system, each voter may cast a vote for each vacant seat on the board. Casting multiple votes for one candidate is prohibited. The available town board positions are filled by the candidates who receive the highest vote total; a candidate need not receive a majority of votes to assume a seat on the board.

The ward system of electing town board members is an alternative to the at-large system of election and is authorized by sections 81 and 85 of the Town Law. Unlike cities in New York, which have a mix of both at-large and ward-elected board members, only a handful of towns currently elect board members by ward. As of 2012, only 11 of 932 towns in New York use the ward system, and since the mid-1970's, voters have defeated its implementation wherever it has been on the ballot.

A town of the first class may, upon the vote of the town board or upon a duly qualified petition, submit a proposition to the voters for establishing the ward system. If the voters approve the proposition, the county board of elections must divide the town into four wards and fix their boundaries. "So far as possible the division shall be so made that the number of voters in each ward shall be approximately equal" (Town Law section 85[1]). The ward system is deemed established only upon the date the county board of elections duly files a map "showing in detail the location of each ward and the boundaries thereof" (Town Law section 85[1]).

The boundaries of the wards are not generally known at the time of the ballot, but instead are fixed by the board of elections if the proposition is successful. Apart from the constitutional requirement of "one person one vote" (see, Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362) codified in the statute by its demand that wards contain "approximately" the same number of voters, the voter has few assurances how wards will be drawn.

If the ward system is established, the terms of the sitting board members end on December 31, after the first biennial town election held at least 120 days after the ward system is established. The terms of the board members elected by ward commence January 1 following such election.

Only a town of the first class is authorized to both establish the ward system and increase the number of board members from four to six, and such a town may submit both propositions at the same election (Op. Atty. Gen. [Inf.] 90-63; 1968 Op. Atty. Gen. [Inf.] 52; 13 Op. St. Compt. 223, 1957). May a town of the second class, which is not authorized to increase the number of board members or establish the ward system, submit a proposition to the electorate to change its classification to first class at the same election it submits the other propositions? Under the authorizing sections of sections 81 and 85 the Town Law, the answer is that the electorate must first approve a change in classification to first class, with subsequent elections necessary to increase the number of board members and establish the ward system. The Attorney General has opined, however, that a town of the second class may, by enactment of a local law, increase its number of board members and establish the ward system (Op. Atty. Gen. [Inf.] 90-63). Under the Municipal Home Rule Law (MHRL) towns, cities, counties and villages are authorized to adopt local laws not inconsistent with the Constitution or any general law, in relation to, inter alia, "the powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees" (MHRL, section 10 [1] [ii] [a] [1], emphasis supplied). Such a local law would be itself subject to a mandatory referendum (MHRL, section 23 [2] [b], [e], [g]).

Therefore, if the voters want representation by ward they have the means to establish it.

7.4.1.2 Tax Assessment

One of the cornerstones of town government is in its authority to assess, levy, collect and enforce payment of taxes. The real property tax remains the most important source of locally raised municipal revenue despite enactments of sales and use, admissions, off-track betting and income taxes. Another major portion of municipal revenue comes from intergovernmental transfers. Fundamental to the levy and collection of real property taxes is the function of property assessment. The goal of property tax assessment is to value property consistently and fairly. The practice

has been to make uniform assessments at a constant percentage of full value within a municipality, and to equalize these rates among municipalities. This matter is discussed more fully in Chapter 11 [115].

Assessing is done in towns by an assessor or board of assessors. In the past, all towns had to have a board of three assessors. Later, towns were permitted to substitute a single assessor for the board. Still later, the Assessment Improvement Act of 1970, which required training and county assistance for local assessors, also stated that each town had to provide for a single, appointed assessor unless it took positive action, by way of mandatory referendum, to retain its elected three-member board. All towns also must provide for a board of assessment review, consisting of three to five members, to hear grievances and appeals from determinations of the assessor.

The assessment roll which the town assessor prepares serves a dual, and sometimes triple, purpose. First, it is the basis for all town general taxes and county taxes levied within the town. Second, a copy of the roll must be made available to all school districts within the town and is used, unchanged as to assessments, to prepare the school district tax roll. Third, any village, wholly or partially, within the town may adopt and use the town roll for levying village taxes instead of assessing its own properties.

7.4.1.3 Levy of Taxes

The completed tax roll is forwarded to the county together with the town budget and estimates of levies required for town purposes. These amounts, and the county taxes required within the town, are levied and recorded on the tax roll prior to December 31st of each year. At this point, unpaid school taxes from the last school tax roll, are also re-levied on the town tax roll. This process may differ within the jurisdiction covered by city school districts.

7.4.1.4 Collection and Enforcement

In towns of the first class, the collection of taxes is carried out by a receiver of taxes and assessments, an office that may be either elective or appointive by local choice. Prior to August 2016, the town receiver also collected all school taxes for school districts located wholly or partially in the town, unless the town and school district have made an agreement to the contrary. New legislation enacted in 2016 authorizes school boards to advise the town's receiver of taxes in writing by no later than February first of each year that the school district will collect its own taxes. In towns of the second class, the collecting officer is the elected town tax collector. However, such towns may abolish the office of collector and, thereafter, the town clerk must collect the taxes.

7.4.1.5 General Administration

The cost of general administration of town functions, including the salaries of town officers is levied as town-wide charges even where the functions are less than town-wide in scope. For example, the salary of the town superintendent of highways and the capital cost and operation of the town highway garage are both general (town-wide) charges, even though their functions basically cover only part of the town (the portion outside villages). On the other hand, the salaries of highway employees may be either general charges or applied to only part of the town, depending on the highway item to which their time is charged.

7.4.2 Part-town Organization

Services for part of the town may be rendered to either all of that portion of the town outside villages (TOV), or to particular areas of the town by way of improvement districts or improvement areas.

Until recent decades, the only major service that towns were required to provide to town residents living outside villages was highway maintenance. Town government provided few services other than general government

administration and basic functions, such as justice court. Lately, however, population growth in TOV areas has resulted in demands for many of the services already provided by villages. It should be noted that functions, such as waste collection and disposal, can, and often are, provided on either a town-wide or TOV basis. The more common TOV functions include:

- Appointment of a planning board to regulate subdivisions and review site plans, and assist in developing and administering zoning;
- Adoption of zoning regulations, appointment of a building inspector or zoning enforcement officer to administer and enforce them, and appointment of a zoning board of appeals to hear appeals and grant relief in proper instances;
- Police protection, which may be provided on either town-wide or TOV basis, depending upon the availability of police protection within the villages in the town; and
- Highway construction and maintenance, which must be considered a TOV function, since it normally encompasses only town streets and highways outside villages.

Since the highway function of towns predated the establishment of villages, certain highway maintenance costs are town-wide charges.

Over the years, village taxpayers' responsibility for sharing the cost of town highways has been a contentious factor in town-village relationships. Consequently, there has been a continual search for ways of promoting equity in the distribution of costs. One compromise permits towns to exempt village property from assessment for the cost of acquisition and repair of highway machinery, the cost of snow removal, and several other miscellaneous items.

7.4.2.1 Fire Protection

Fire protection is not a town function, since it can only be provided in towns through the medium of districts — fire districts, fire protection districts and fire alarm districts — all of which are discussed in Chapter 9 [91]. Since most TOV areas are covered by districts, fire protection can be considered, in a sense, a TOV service.

7.4.2.2 Special Districts

Towns in the path of suburban growth were not prepared to provide needed services on a town-wide basis. Tax bases were hardly sufficient to support town-wide water systems or sewer systems. The need was not general enough throughout the town so as to garner voter support to town-wide services. The expedient answer was, therefore, to create the special district. Large enough to serve the area of need and supported only by the property owners within the district, the special district required from the rest of the town only use of the town's credit to financially support its obligations and use of the town's organization to administer the services within the district. Districts have worked well and have multiplied in both number and type.

Unlike the districts discussed in Chapter 9 [91], special districts created under the Town Law are not units of local government, but are administered by the town board. Town improvement districts have proliferated, with lighting, water supply, sewerage, drainage, park, public parking, and refuse and garbage districts accounting for over 95 percent of all special districts. The idea has proved so flexible and has worked so well that it has been used to meet some unusual and unique needs. Escalator districts have been formed to relieve weary commuters of their climb to elevated train stations, and dock and erosion control districts have enhanced seaside properties on Long Island.

Special districts have been established, extended and consolidated until, by the end of 2010, there were approximately 6,927 improvement districts in existence — an average of more than seven for each town in the state.

Table 7.1: Town Special Improvement Districts by Type of District
As of December 31, 2010 [2]

Type of District	Number of Districts
Fire Protection	951
Drainage	582
Lighting	1,783
Park	153
Refuse and Garbage	160
Sewer	1,211
Water	1,602
Other	485
Total	6,927

Most special districts can be and are established under general provisions of Articles 12 and 12-A of the Town Law. Those which cannot must be created by act of the State Legislature.

Under Article 12, a petition from property owners in the area of the proposed district must specify the boundaries of the district and state the maximum permissible expenditure. For certain types of districts a map showing the boundaries of the district and the proposed improvements must accompany the petition. The petition must be signed by owners of more than one-half of the total assessed valuation of taxable property in the proposed district, including at least one-half of the resident-owned, taxable, assessed valuation therein. When such a petition is filed, the town board must call a public hearing on the proposal and, after consideration, approve or deny the establishment of the district. If the town board approves the establishment of a district for which the town is to incur indebtedness, it must apply to the State Comptroller for approval. The State Comptroller, after considering the application, must make an independent determination that establishment of the district will serve the public interest and that it is not an undue burden on the property or property owners who live there. After the State Comptroller approves the petition, the town board may adopt an order establishing the district.

Under Article 12-A, a petition is not required to establish a district; the town board may, on its own motion, subject to a permissive referendum, establish a district. All other procedural steps are essentially the same as under Article 12.

With the exception of 78 older special districts which retain their separate boards of commissioners, the town board acts as the administrative body for all improvement districts in a town. Specific provisions of the Town Law authorize a town board to let contracts for the construction of district improvements, determine the manner of levying assessments to cover costs, set water and sewer rents or other service charges, and provide for the issuance of obligations to cover capital costs. Although all district costs must be levied against the properties therein, the districts have no debt-incurring powers of their own. All obligations issued on their behalf must be general obligations of the town, and are chargeable to town debt limits.

7.4.2.3 Town Improvements

As towns have continued to develop in suburban areas, the need for services on a town-wide or at least TOV basis has become more pressing. The “town improvement” is a compromise between the district approach and the provision of services as a true town function. This approach allows a town board to construct infrastructure improvements in specific areas of the town while not establishing a district with defined boundaries. First authorized

[2] NYS Attorney General Office 2010

only for Suburban Towns, authority for town improvements was later extended to all towns. In establishing an improvement by this method, the town board has the option of levying the capital costs against the entire TOV area, or against the benefited areas only, or of allocating it between the two areas in any way it chooses. The cost of operating and maintaining the improvement must be levied against the entire TOV area. Thus, the town improvement procedure is simpler and more flexible than that available for creating an improvement district.

7.5 Summary

Many towns in New York are still small governments providing basic services to rural residents and they continue the pattern of town government which originated before the American Revolution. Other town governments, caught in the mass population migrations of the Twentieth Century, have had to provide services usually associated with urban living. Both kinds of town governments — and the gradations between — must deal with problems such as protecting the environment and delivering municipal services against a fiscal background of ever increasing costs. Rising costs will probably compel town government to develop new patterns of working with other governments and new ways to deliver services. Town residents and government officials, who have had to respond to similar challenges in the past, will doubtless continue town government's long tradition of responding to change.

Chapter 8

Village Government

In New York State, the village is a general purpose municipal corporation formed voluntarily by the residents of an area in one or more towns to provide themselves with municipal services. But when a village is created, its area still remains a part of the town where it is located, and its residents continue to be residents and taxpayers of that town.

The first village was incorporated at the end of the eighteenth century. The village form of municipal organization became a prominent feature of the state's growing metropolitan areas between 1900 and 1940. The patterns of village organization are similar to those of cities.

Many people think of villages as being small, rural communities. Population size alone, however, does not determine whether one community becomes a village and another remains as an unincorporated "hamlet" in a town. In New York State, a village is a legal concept; it is a municipal corporation. The largest village in the state, Hempstead in Nassau County, had more than 53,000 residents in 2010, while the smallest city, Sherrill, had 3,071. Forty-eight of New York's 62 cities had populations in the year 2010 that were smaller than Hempstead's.

Villages were originally formed within towns to provide services for clusters of residents, first in relatively rural areas and later in suburban areas around large cities. Today, many of the existing 550 villages are in the areas surrounding the state's larger cities. Many villages have public service responsibilities which differ little from those of cities, towns and counties, and village officials face the full range of municipal obligations and challenges.

8.1 What is a Village?

A village is often referred to as "incorporated." However, since legally cities, towns, villages and counties are all "incorporated," there are no "unincorporated villages." The vernacular "incorporated village" likely came about because villages are areas within towns for which an additional municipal corporation has been formed.

Many places in the state having large numbers of people living in close proximity to one another are neither villages nor cities. Many have names, like neighborhoods often do. Others may even have a post office that bears the community's name. Some, like Levittown on Long Island, have thousands of residents. If, however, the people in these informal communities have not incorporated pursuant to the Village Law, they do not constitute a village. While many people refer to such places as "hamlets", the term "hamlet" does not define a formal community like a city, town or village.

By definition, a village is a municipality which, at the time of its incorporation, met statutory requirements then established as prerequisites to that incorporation (Village Law.) Although the Village Law now sets area and population criteria for initial village incorporation, a number of existing villages have populations smaller than the present statutory minimum.

8.2 Historical Development

The earliest villages in the state were incorporated partly to circumvent the legal confusion about the nature and scope of town government that resulted from legislative modification of English statutes. Generally, in the decades after the Revolution, villages in New York were created because clusters of people in otherwise sparsely settled towns wanted to secure fire or police protection or other public services. Those inhabitants receiving the fire or police service, and not the whole town, paid for such services. A forerunner of villages appears to have been a 1787 legislative act granting special privileges to part of a town, entitled "An act for the better extinguishing of fires in the town of Brooklyn."

The appearance of the village as a formal unit of local government stems from the 1790s. Villages were created by special acts of State Legislature, but the starting date for this process is in dispute among historians due to a lack of precision in terminology in those early legislative acts. In 1790, the Legislature granted specific powers to the trustees of "… part of the town of Rensselaerwyck, commonly called Lansingburgh." The term "village" first appeared in state law in a 1794 enactment incorporating Waterford. The legislative act of 1798, providing for the incorporation of Lansingburgh and Troy as villages, is seen by many historians as the first formal authorization in the state for the village form of government. This enactment included all of the legal elements (including an incorporation clause and delegation of taxing and regulatory power) deemed necessary for a true unit of local government.

First mention of the village as a constitutional civil division appeared in a section of the 1821 Constitution prescribing qualifications of voters. The Constitution of 1846 required that the Legislature "provide for the organization of cities and incorporated villages." The Legislature passed a general Village Law in 1847, but continued to incorporate villages through the enactment of special charters, as it had for the previous half-century. Separate incorporation led to a variety of village government forms, even for villages of similar characteristics. In 1874, however, a revised Constitution forbade incorporation of villages by special act of the State Legislature. Since that time, New York State villages have been formed through local initiative pursuant to the Village Law.

An 1897 revision of the Village Law subjected those villages with charters to provisions of the Village Law that were not inconsistent with their charters. It also gave the charter villages the option of reincorporating under the general law. Although numerous charter villages did reincorporate, 12 villages still operate under charters. These are Alexander, Carthage, Catskill, Cooperstown, Deposit, Fredonia, Ilion, Mohawk, Ossining, Owego, Port Chester and Waterford.

In the first 40 years of the twentieth century, as people moved from cities into the suburbs, more than 160 villages were incorporated under the Village Law. The rapid growth of towns in suburban areas in the late 1930s and following World War II emphasized the need for alternatives to villages. To provide services, suburban areas made increasing use of the town improvement district. This had a profound effect on the growth of villages. Although more than 160 villages were formed from 1900 to 1940, 27 new villages appeared and 26 villages dissolved between 1940 and December 31, 2012.

There were 535 villages in New York State in 2018. They range in size from the Village of Dering Harbor with a 2010 Census population of 11, to the Village of Hempstead, with a 2010 Census population of 53,891. The majority of villages have populations under 2,500, although there were 24 villages between 10,000 and 20,000 population in 2010, and 11 villages with more than 20,000 population.

There are 72 villages located in two towns and 5 villages are located in three towns. There are nine villages which are in two counties. One village, Saranac Lake, lies in three towns and two counties. Five villages — Green Island in Albany County; East Rochester in Monroe County; and Scarsdale, Harrison and Mount Kisco in Westchester County — are coterminous with towns of the same name. A coterminous town-village is a unique form of local government organization. The town and village share the same boundaries and the governing body of one unit of the coterminous government may serve as the governing body of the other unit (i.e., the mayor serves as town supervisor and trustees serve as members of the town board).

8.3 Creation and Organization

The Village Law governs the incorporation of new villages and the organization of most existing villages. The 12 remaining charter villages are subject to this law only where it does not conflict with their respective charters.

8.3.1 Incorporation

A territory of 500 or more inhabitants may incorporate as a village in New York State, provided that the territory is not already part of a city or village. The territory must contain no more than five square miles at the time of incorporation, although it may be larger in land area if its boundaries are made coterminous with those of a school, fire, improvement or other district, or the entire boundaries of a town.

The incorporation process begins when a petition, signed by either 20 percent of the residents of the territory qualified to vote, or by the owners of more than 50 percent of the assessed value of real property in the territory, is submitted to the supervisor of the town in which all or the greatest part of the proposed village would lie. If the area lies in more than one town, copies of the petition are presented to the supervisors of the other affected towns.

Within 20 days from the filing of the petition the supervisor of each town affected must post a notice of public hearing on the petition. Where the proposed village is in more than one town, the giving of notice and subsequent hearing are a joint effort of the affected towns. The purpose of the hearing is to determine only whether the petition and the proposed incorporation are in conformance with the provisions of the Village Law. Other considerations and objections to the incorporation are not at issue. This formal hearing must be held between 20 and 30 days following posting of notice.

Within 10 days after the conclusion of the hearing the supervisor of the affected town must judge the legal sufficiency of the petition. If more than one town is involved and the supervisors cannot agree on a decision, their decision is deemed to be adverse to the petition. Any decision made is subject to review by the courts. If no review is sought within 30 days, the decision of the supervisor is final. If the supervisor decides against the petition, a new petition may be presented immediately. If the supervisor finds that the petition meets the requirements of the law or if the petition is sustained by the courts, a referendum is held within the proposed area no later than 40 days after the expiration of 30 days from the filing of the supervisors' favorable decision, or the filing of a final court order sustaining the petition. Only those residing in the proposed area of incorporation and qualified to vote in town elections may vote in the referendum.

Where the proposed area lies in one town, a majority of those voting is required in order to incorporate. Where more than one town is involved, an affirmative majority in the area proposed for incorporation in each town is required. If the required majorities are not obtained, then the question is defeated, and no new proceeding for incorporation of the same territory may be held for one year. If a favorable vote is obtained, and there is no court challenge, the town clerk of the town in which the original petition has been filed makes a report of incorporation.

Table 8.1: Village Incorporations Since 1940

Village	County	Date
Prattsburg	Steuben	12/07/1948
Tuxedo Park	Orange	08/13/1952
Sodus Point	Wayne	12/30/1957
New Square	Rockland	11/06/1961
Atlantic Beach	Nassau	06/21/1962
Amchir	Orange	09/09/1964
Pomona	Rockland	02/03/1967

Table 8.1: (continued)

Village	County	Date
Lake Grove	Suffolk	09/09/1968
Round Lake	Saratoga	08/07/1969
Sylvan Beach	Oneida	03/17/1971
Lansing	Tompkins	12/19/1974
Harrison	Westchester	09/09/1975
Kiryas Joel	Orange	03/02/1977
Rye Brook	Westchester	07/07/1982
Wesley Hills	Rockland	12/07/1982
New Hempstead	Rockland	03/21/1983
Islandia	Suffolk	04/17/1985
Montebello	Rockland	05/07/1986
Chestnut Ridge	Rockland	05/16/1986
Pine Valley	Suffolk	03/15/1988
Kaser	Rockland	01/25/1990
Airmont	Rockland	03/28/1991
W. Hampton Dunes	Suffolk	11/19/1993
East Nassau	Rensselaer	01/14/1998
Sagaponack	Suffolk	09/27/2005
S. Blooming Grove	Orange	07/14/2006
Woodbury	Orange	08/28/2006
Mastic Beach	Suffolk	09/21/2010

The report is sent to the Secretary of State, the State Comptroller, the State Office of Real Property Services, the county clerk and county treasurer of each county in which the village will be located, and the town clerks of each town in which the village will be located.

Upon receipt of the report, the Secretary of State prepares and files a Certificate of Incorporation. The certificate is also filed with the clerks of each town in which the village is located. The village is deemed incorporated on the date the report is filed with the Secretary of State. Within five days after the filing of the Certificate of Incorporation, the clerks of each town in which the village is located jointly appoint a resident of the new village area to serve as village clerk until a successor is chosen by the village's first elected board of trustees. Election of the board and mayor is held within 60 days of the appointment of the interim village clerk, except in instances where the new village embraces the entire territory of a town. In that case the election of village officers is held at the next regular election of town officials occurring not less than 30 days after the filing of the certificate of village incorporation.

8.3.2 The Legislative Body

The legislative body of a village — the board of trustees — is composed of the mayor and four trustees. However, the board may increase or decrease the number of trustees, subject to either referendum on petition or mandatory referendum, depending on how the local law is structured. Trustees are elected for a two-year term unless otherwise provided by local law.

The village board has broad powers to govern the affairs of the village, including:

- organizing itself and providing for rules of procedure

- adopting a budget and providing for the financing of village activities;
- abolishing or creating offices, boards, agencies and commissions, and delegating powers to these units;
- managing village properties; and
- granting final approval of appointments of all non-elected officers and employees made by the mayor.

The mayor presides over meetings of the board. A majority of the board, as fully constituted, is a quorum. No business may be transacted unless a quorum is present.

8.3.3 Executive Branch

The chief executive officer of most villages in New York State is the mayor. Unless otherwise provided by local law or charter, the mayor is elected for a two-year term. In addition to executive duties, the mayor presides over all meetings of the board of trustees and may vote on all questions coming before that body. The mayor must vote to break a tie. Unless provided by local law the mayor does not have veto power. The mayor is responsible for enforcing laws within the village and for supervising the police and other officers of the village. The mayor may share the law-enforcement responsibility with a village attorney — who may handle prosecutions for violations of village laws — and the county district attorney — who usually handles general criminal prosecutions in the county.

At the direction of the board of trustees, the mayor may initiate civil action on behalf of the village or may intervene in any legal action "necessary to protect the rights of the village and its inhabitants." Subject to the approval of the board of trustees, the mayor appoints all department and non-elected officers and employees. Except in villages which have a manager, the mayor acts as the budget officer. The mayor may, however, designate any other village officer to be budget officer. The budget officer serves at the mayor's pleasure. The mayor ensures that all claims against the village are properly investigated; the mayor may also execute contracts approved by the board of trustees and issue licenses. In certain cases, when authorized by the board of trustees, the mayor may sign checks and cosign, with the clerk, orders to pay claims.

At the annual meeting of the board of trustees, the mayor appoints one of the trustees as deputy mayor. If the mayor is absent or unable to act as mayor, the deputy mayor is vested with and may perform all the duties of that office.

8.3.4 Village Managers or Administrators

In order to provide full-time administrative supervision and direction some villages have created the office of village manager or administrator. The position of village manager is created by a local law, which fixes the powers of the office and the term of the incumbent. As an alternative to direct adoption of a local law establishing a village manager, a village may create a commission to prepare a local law establishing a village manager and defining the manager's duties and responsibilities. The commission must issue a report within the time set forth in the local law, which can be no later than two years after the appointment of its members. While there is no mandate that the commission prepare a local law creating a village manager, if the commission does prepare such a local law, it must be placed before the voters at a referendum; the board of trustees need not approve the local law.

The village manager is usually assigned administrative functions which would otherwise performed by the mayor. Under the Village Law, the manager may designate another village official as budget officer, to serve at the pleasure of the manager.

Fifty five villages in New York State had an administrator or manager in 2005; they are listed in Table 8.2 [86]. Some of these individuals hold more than one title and some are known as "coordinator".

Table 8.2: Villages Which Have Administrators/Managers [1]

Amityville	Ardsley	Attica	Bergen
Briarcliff Manor	Brockport	Bronxville	Canastota
Croton-on-Hudson	Dobbs Ferry	East Aurora	East Hampton
East Rochester	Ellenville	Elmsford	Fairport
Floral Park	Fredonia	Garden City	Great Neck Estates
Groton	Hamburg	Hastings-on-Hudson	Horseheads
Huntington Bay	Irvington	Lake Success	Lawrence
Lowville	Mamaroneck	Massapequa Park	Massena
Mount Kisco	Muttontown	Oakfield	Ocean Beach
Old Westbury	Ossining	Pelham	Pelham Manor
Pleasantville	Port Chester	Port Jefferson	Potsdam
Rockville Centre	Sea Cliff	Seneca Falls	Scarsdale
South Floral Park	Tarrytown	Thomaston	Walden

8.3.5 Other Village Officers

The village treasurer is the chief fiscal officer of the village. The treasurer maintains custody of all village funds, issues all checks and prepares an annual report of village finances.

The village clerk has responsibility for maintaining all records of the village. The clerk collects all taxes and assessments, when authorized by the village board, and orders the treasurer to pay claims. The clerk is required "on demand of any person" to "produce for inspection the books, records and papers of the office." The clerk must keep an index of written notices of defective conditions on village streets, highways, bridges or sidewalks and must bring these notices to the attention of the board at the next board meeting or within 10 days after their receipt, whichever is sooner.

Unless local law provides otherwise, the mayor appoints both the clerk and the treasurer with the approval of the board of trustees. The village board may also establish a term of office for each position by local law. In many villages, the offices of clerk and treasurer are combined and are held by a single person.

The board of trustees may establish the office of village justice. Where no village justice is established, or where the office has been abolished, the functions devolve on the justices of the town — or towns — in which the village is located.

8.3.6 Organization for Service Delivery

Differences in the size of villages and in the services they perform make it difficult to describe the organization of a "typical" village. Larger villages often have multi-departmental organizations similar to cities, while small villages may employ one or two individuals. Functions performed by villages range from basic road repair and snow removal to large-scale community development programs and public utility plants. A number of villages operate their own municipal electric systems.

[1] Source: 2005 NYCOM Directory of City & Village Officials, New York State Conference of Mayors and Municipal Officials, 2005.

8.4 Financing Village Services

Like most local governments, villages have a strong reliance on the real property tax to finance their activities. In the 2012 fiscal year the real property tax accounted for 49 percent of total village revenues in New York State. The balance of revenues comes from a variety of sources. These include user charges and other revenue from water and sewer services, electric systems, airports and marinas, as well as license and rental fees and penalties on taxes. Special activities generated 37 percent of all village revenues in fiscal 2012. Sales tax revenues in 2012 accounted for 6 percent of total revenues for villages. State and federal aid provided 8 percent of village revenue in 2012.

8.4.1 State Aid and Village Finance

The major state aid program which provides funds to villages is per capita revenue sharing. Other important components of state aid to villages include the mortgage tax, aid for the construction and operation of sewage treatment plants, and aid to youth bureaus and recreation programs. A more detailed discussion of revenue sharing and other state aid appears in Chapter 11 [115].

The mortgage tax is a state tax which is collected by counties. The allocation to towns is made according to the location of the real property covered by the mortgages upon which the tax was collected. For towns which contain a village within its limits, a portion of the town allocation is made to the village according to the proportion the assessed value of the village bears to twice the total assessed valuation of the town. While a village, under this formula, would receive aid even if no mortgages were registered in a village, the town may receive the greater amount of revenue, even though much of the property which yields the revenue may be within villages in the town.

8.5 Village Dissolution

Just as villages are formed by local action, they can be dissolved by local action. Article 17-A of the General Municipal Law, effective March 2010, provides the procedure for village officials and electors to disband their village. Since villages are formed within towns, the underlying town or towns would become fully responsible for governing the territory of the former village after it is dissolved.

The dissolution process may be commenced by the village board of trustees on its own motion or through the presentation of an appropriate petition to the board of trustees. If the board seeks to initiate dissolution process on its own motion, it may submit a proposition to dissolve the village to the electors, in accordance with a plan for dissolution. If a petition is presented, the board is obligated to hold a referendum on the dissolution question. If a majority of electors vote to dissolve, then the board must create and endorse a “dissolution plan”, which is subject to permissive referendum by the electors. In either case, the question must be decided by the voters of the village at an election.

It is not unusual for a village board to seek assistance of community members and other government officials as it explores the question of dissolution. One way of doing this is to form a study committee charged with preparing a dissolution study and a draft dissolution plan for consideration by the board of trustees. Alternatively, the board of trustees can study dissolution on its own, with the assistance of other village officers and employees. Since village dissolution results in the termination of the corporate entity, there are many issues to be considered, including:

- potential means to continue services, such as fire, police, garbage collection, water and sewer services, and the projected cost of services;
- disposition of surplus village properties;

- regulatory matters, such as the continuation of land use restrictions; and
- continuing contractual matters, including public employee contracts.

Many of these issues require implementation by the underlying town or towns, yet the statutory dissolution process provides no role for towns. Despite this, successful dissolutions have involved town officials from the start of dissolution deliberations. This can be accomplished through active participation of town officials on a village study committee or through regular joint meetings of village and town officers. While village electors alone determine whether dissolution will occur, these same electors are, and will continue to be after dissolution, town electors as well. This factor favors early and active participation by town officers as the plan for dissolution is formed.

Table 8.3: Village Dissolutions in New York State

Village	**Date**
Altmar (Oswego County)	06/01/2013
Andes (Delaware County)	12/31/2003
Belleville (Jefferson County)	04/20/1979
Bloomingdale (Essex County)	02/26/1985
Bridgewater (Oneida County)	12/31/2014
Downsville (Delaware County)	09/21/1950
East Randolph (Cattaraugus County)	12/31/2011
Edwards (St. Lawrence County)	12/31/2012
Elizabethtown (Essex County)	04/23/1981
Fillmore (Allegany County)	01/13/1994
Forestport (Oneida County)	06/18/1938
Fort Covington (Franklin County)	04/05/1976
Friendship (Allegany County	04/04/1977
Henderson (Jefferson County)	05/23/1992
Keeseville (Clinton & Essex County)	12/31/2014
LaFargeville (Jefferson County)	04/18/1922
Limestone (Cattaraugus County)	12/31/2010
Lyons (Wayne County)	12/31/2015
Marlborough (Ulster County)	04/20/1928
Mooers (Clinton County)	03/31/1994
Newfield (Tompkins County)	12/02/1926
North Bangor (Franklin County)	03/24/1939
Northville (Suffolk County)	05/16/1930
Old Forge (Herkimer County)	10/21/1933
Oramel (Allegany County)	12/23/1925
Pike (Wyoming County)	12/31/2009
Prattsburg (Steuben County)	09/22/1972
Prattsville (Greene County)	03/26/1900
Randolph (Cattaraugus County)	12/31/2011
Rifton (Ulster County)	08/18/1919
Rosendale (Ulster County)	05/23/1979
Perrysburg (Cattaraugus County)	12/31/2011
Pine Valley (Suffolk County)	04/4/1990
Pine Hill (Ulster County)	09/24/1985
Pleasant Valley (Dutchess County)	05/22/1926
Roxbury (Delaware County)	04/18/1900

Table 8.3: (continued)

Village	Date
Savannah (Wayne County)	04/25/1979
Schenevus (Otsego County)	03/29/1993
Seneca Falls (Seneca County)	12/31/2011
The Landing (Suffolk County)	05/25/1939
Ticonderoga (Essex County)	05/1/1992
Westport (Essex County)	05/29/1992
Woodhull (Steuben County)	01/13/1986

8.6 Trends

Several significant trends, issues and problems affecting village government in New York have become apparent in the last quarter of the Twentieth Century.

8.6.1 Zoning

The power to zone the area of the village separately from the remainder of the town still provides an incentive for village incorporation. The 1972 recodification of the Village Law continues the authority of the board of trustees to regulate land use, lot sizes and density of development. With certain exceptions, villages which adopt their first zoning law must establish a zoning commission to draft regulations and establish zone boundaries. They must also establish a zoning board of appeals to hear appeals from decisions made by the village official who enforces zoning regulations. A more detailed discussion of zoning and other aspects of land use regulation appears in Chapter 16 [183]. It should be noted that the proliferation of villages in Nassau County resulted in a charter provision that grants zoning authority to towns within any territory incorporated as a village on or after January 1, 1963. There have, however, been no villages incorporated on or since that date.

8.6.2 Village-Town Relations

Fiscal relations continue to be a source of contention between towns and villages. Village residents are liable for payment of taxes to the town in which their village is located, as well as to the village in which they reside. Before the advent of the automobile, village residents rarely considered this dual taxation unduly burdensome. However, the need for paved town roads and the rapid growth of population in towns near the state's metropolitan areas has greatly increased expenditures for town highways and highway-related items.

The State Highway Law exempts village residents from paying the costs of repair and improvement of town highways, thus relieving them of a substantial portion of the town highway maintenance expense. Unless exempted by the town board, however, village residents must help bear the costs of town highway equipment and snow removal on town roads. Village residents not exempted from such highway costs may believe they are being taxed for town services they do not receive or use in addition to being taxed for the same services within their village. Villages also regard as inequitable the rent the town may charge for village use of the town highway equipment that the village residents have already helped pay for through taxation.

The question of who should pay for what services has been a source of contention between towns and villages since the 1950s, but it is one which can be resolved through local cooperative action. Towns and their constituent

villages often undertake formal and informal cooperative ventures. Many share municipal buildings as well as officials and employees, or engage in cooperative purchasing, auto maintenance and emergency vehicle dispatching. For example, one government may provide library, ambulance, landfill or recreation programs to the other at a negotiated fee. More information on inter-municipal agreements is found in Chapter 17 [197].

Chapter 9

Special Purpose Units of Government

Local municipal services are provided in New York not only by the general purpose municipal corporations - counties, cities, towns and villages - but by several types of special purpose units of government. These include school districts, fire districts and a variety of public benefit corporations — often called "authorities." In most cases, such units provide only a single service or a group of closely-related services.

As demands for municipal services have increased, many new types of public benefit corporations have been established. These entities normally provide a single service or type of service, such as water and sewer services, airport management, or industrial development, rather than the gamut of government services provided by the general purpose municipality.

School districts, fire districts and "local" public benefit corporations, often referred to as authorities, are discussed within this chapter.

9.1 Public Education

The constitutional basis for school district organization appears in Article XI, section 1 of the State Constitution:

> "The legislature shall provide for the maintenance and support of free common schools, wherein all the children of the state may be educated."

The 1795 legislative session provided, on a five-year basis, a statewide system of support for schools, but comprehensive legislation establishing school districts was not enacted until 1812.

Education in New York State today represents the largest single area of expense for local governments, accounting for approximately one-third of all local government expenditures in the state.

By any measure, the most prominent elements of the educational effort are the 697 local school districts, which in 2010-11 enrolled more than 2.6 million pupils and spent over $56 billion.

School districts cover the entire area of New York State, frequently crossing city, town, village and even county lines. With the exception of the "big five" cities (over 125,000 in population), where the school budget is part of the municipal budget, each school district is a separate governmental unit having the power to levy taxes and incur debt.

The State Education Department, acting in accordance with policies determined by the Board of Regents of the University of the State of New York, supervises and provides leadership to the public schools.

Some of this responsibility is exercised through supervisory districts headed by district superintendents of schools.

9.1.1 Basic School District Types

Table 9.1: New York State School Districts, as of July 2004 [1]

Type	Number of Districts
Common School Districts	11
Union Free School Districts	161
Central School Districts	460
City School Districts	62
Central High School Districts	3
Total	697

SOURCE: Department of Education

There are five different types of school districts in New York State:

9.1.1.1 Common School Districts

The common school district, with its origins in legislation of 1812, is the oldest of the existing types. Common school districts do not have the legal authority to operate high schools but, like all school districts, are responsible for ensuring a secondary education for resident children. As a consequence, common school districts send pupils to designated high schools of neighboring school districts. As of July 2011, there were 11 common school districts operating in the state. One common district, the South Mountain Hickory District in the Town of Binghamton, does not directly provide education; it contracts for all education. Common school districts are typically governed by either a sole trustee or a three-member board of trustees.

9.1.1.2 Union Free School Districts

The 1853 session of the Legislature established the union free school district, which is generally formed from two or more common school districts joining together for the purpose of providing a high school. Many of the early union free districts had boundaries which were coterminous with, or close to, those of a village or city.

Although the original purpose of the union free district was to provide for secondary education, about one-fifth of these districts currently do not operate a high school. As of July 2011, there were 161 union free school districts, of which 28 provide less than a K-12 education. Thirteen of the latter are components of central school districts, while the rest provide secondary education by contracting with neighboring districts. Another 13 are districts that are established solely to serve children residing in specified child care institutions. These districts are often referred to as “special act” school districts. Union free school districts are governed by a board of education that is composed of between three and nine members.

9.1.1.3 Central School Districts

The central school district is the most common type of school district in New York State, with 460 in existence as of July 1, 2011. They were established as a means of providing a more comprehensive and intensive education than was possible in most of the 10,000 small common districts operating in the state at the turn of the 20th century.

[1] Source: NYS Department of Education.

The solution came in the form of the Central Rural Schools Act of 1914, which was revised in 1925. This legislation, together with state aid incentives, preceded a massive school reorganization, which resulted in the central school districts of today.

A central school district may be formed by any number of common, union free and central districts. As in the case of union free districts, central school districts have the authority to operate high schools. The governance of a central district follows essentially the same laws as a union free district; thus, it can be viewed as a variation of the union free type of district.

One difference between the two types of districts is the size of the board of education. A central district's board may consist of five, seven or nine members. Within this limitation, the size of the board or length of term (three, four or five years) may be changed by the voters of the district.

9.1.1.4 City School Districts

There are two types of organization for city school districts, the application of which depends on population.

School districts in the 57 cities of under 125,000 in population are separate governmental units. Each district is governed by its own board of education and has independent taxing and debt-incurring powers. In all of these districts, the members are elected to the school boards, which may consist of five, seven, or nine members.

Many of these city districts encompass larger geographic areas than their respective cities, and are referred to as "enlarged city school districts." Seven of these enlarged districts have been reorganized as "central city school districts," a designation limited to districts in cities with less than 125,000 population.

In the state's five cities of over 125,000 in population (the "Big Five" – Buffalo, Rochester, Syracuse, Yonkers and New York City), district boundaries are coterminous with those of their respective cities. Each of these school districts has a board or panel with varying independence and power to set policy for the school system. However, none of these boards have the power to levy taxes or incur debt for the district. Instead, funding is provided as part of the overall municipal budget. Buffalo, Rochester and Syracuse have separately-elected boards of education. In Yonkers, however, the board is appointed by the mayor. Buffalo and Yonkers each have nine-member boards, while Rochester and Syracuse have seven-member boards.

Since 2002, New York City public school system is been run as a city agency, headed by a Chancellor. Instead of a Board of Education that is responsible for setting broad policy, the Department of Education has the Panel for Educational Policy (PEP), which advises the Chancellor and approves major Department of Education initiatives, budgets and union agreements. The PEP consists of 13 appointed members and the Chancellor. Each borough president appoints one member and the mayor appoints the remaining eight. The Chancellor serves as an ex-officio non-voting member. The PEP is responsible for electing a chairperson from among the voting members.

9.1.1.5 Central High School Districts

The central high school district is the most unique organization type; as of July 2011 only three existed, all in Nassau County.

Central high school districts provide secondary education to children from at least two common or union free districts, which provide elementary education. Appointed representatives from the component districts' boards of education comprise the board of education for each central high school district.

Authorized in 1917, this type of district was seen as a way to promote reorganization of smaller school districts. However, central high school districts proved unpopular, resulting in the repeal of authority for the formation of additional districts in 1944. Thirty-seven years later, in 1981, legislation reinstated the option of central high school districts for Suffolk County only.

9.1.1.6 The Supervisory District

The supervisory district was established in 1910, as a means of providing educational supervision and leadership to the thousands of tiny school districts then in existence. A district superintendent of schools was appointed to head each supervisory district.

At the time of their founding, 208 supervisory districts were established in the state, with as many as seven located in a single county. As of July 1, 2011, 37 supervisory districts existed, each coterminous with the area served by one of the 37 Boards of Cooperative Educational Services (BOCES) in the state.

The district superintendent of schools serves as a local representative of the Education Commissioner and as chief executive officer of the BOCES. Reflecting this dual role, the district superintendent is appointed by the governing body of the BOCES from a list of candidates approved by the Education Commissioner.

9.1.1.7 The BOCES

A Board of Cooperative Educational Services (BOCES) provides a single organization through which local school districts may pool their resources to provide services which might ordinarily be beyond their individual capabilities. The BOCES is formed by a majority vote of the members of local school boards within a supervisory district. A board of five to fifteen members governs the BOCES organization. Members are elected for staggered three-year terms at an annual meeting of the boards of education of the constituent districts.

BOCES services include specialized instructional services — such as classes for students with disabilities and vocational education — as well as support services such as data processing, purchasing and the provision of specialized equipment for constituent districts.

A BOCES has no taxing authority; the sources of BOCES funds are primarily taxes levied by its component districts, state aid, and a relatively small amount of federal aid. The component districts' share of costs is based either on full valuation, a pupil count based on enrollment, or upon the Resident Weighted Average Daily Attendance (RWADA) of each district. Currently, all BOCES, except for one, use the RWADA method of allocating costs.

BOCES services include specialized instructional services – such as classes for students with disabilities and vocational education – as well as support services such as data processing, purchasing and the provision of specialized equipment for constituent districts. Specific BOCES services are financed through contracts between the BOCES and the individual school districts. Thus, a school district pays only for those services it uses. The state reimburses a portion of the individual district's payment to the BOCES for such services.

At the end of the 2010-11 school year, the number of students enrolled from constituent districts ranged from 8,413 to 203,023 students. All but nine school districts in the state were members of a BOCES. Of the nine, four are eligible to become members of BOCES; the remaining districts are the five city school districts with a population over 125,000 which are not eligible to join BOCES. The 37 BOCES served a total of 1,529,320 students in the 2010-11 fiscal year.

9.1.1.8 Charter Schools

A charter school is an independent public school that operates under a "charter," a type of contract issued by the New York State Board of Regents. Charter schools typically provide innovative curricula or other non-traditional approaches that differentiate them from regular public schools. Charter schools are financed by local, state and federal funds, but they have the flexibility to operate free of many educational laws and regulations.

Each charter school, however, is held accountable to provisions in the Charter School Law (Article 56 of the Education Law) and the charter authorizing the school. Every school must also satisfy the same health and safety, civil rights, and student achievement requirements that are applicable to other public schools. A school's charter may

be revoked for violation of charter provisions, failure to meet performance levels on state assessments, serious violations of law, fiscal mismanagement, or employee discrimination in contravention of the Civil Service Law.

A charter is originally issued for a term of up to five years. Upon the expiration of each term, a charter may be renewed for five more years. The Board of Regents may not issue more than 460 charters statewide.

9.1.2 Financing Education

9.1.2.1 Property Taxes

With few exceptions, property taxation is the only major local revenue source available to school districts. Property taxes for schools totaled more than $26.3 billion in 2010-11, or 46 percent of all school revenues. School districts are not subject to constitutional or statutory tax limits, but resident district voters approve annual school budgets, except for the "Big Five" cities. A property tax cap, enacted for school districts and other municipalities in 2011, beginning with the 2012-13 school year, limits the growth of property taxes. If the voters defeat a proposed budget, a school board may only levy taxes equal to the prior year's levy to meet costs for teachers' salaries and a number of "ordinary contingent" expenses. Levy to support capital expenditures, increases in expenditures from court orders and increases in pension cost is excluded from the property tax cap.

In each of the state's five largest cities, the city council determines the school tax levy. The board of education prepares its budget for approval by the city council. The council may increase or decrease the budget as a whole, but it may not change individual items. The levy for schools is then included in the overall city tax levy. Furthermore, the school tax levy must be accommodated within the two percent city tax limit allowed by the state constitution for Buffalo, Rochester, Syracuse and Yonkers, and 2.5 percent allowed for New York City. Nonproperty Taxes. Nonproperty taxes represent a small revenue source for school districts. In 2010-11 school districts collected $271 million from non-property tax sources, or slightly more than one percent of total revenue collected from taxes.

The only nonproperty tax a school district may levy directly is a tax on consumers' utility bills, which may be imposed at a maximum rate of three percent. This tax is limited to school districts with territory in cities of under 125,000 population. Of the 66 school districts eligible to impose this tax in 2010-11, only 24 actually did so.

While only cities and counties can impose a sales tax, the Tax Law provides that they may distribute all or part of the proceeds to school districts. Five of the counties which collected sales taxes in fiscal 2010-11 distributed a portion of the revenue to school districts.

9.1.2.2 State Aid

Receipts from state aid programs represented the second largest revenue source for school districts in the 2010-11 school year. Approximately $20 billion was received in that year, representing about 35 percent of total school revenues. There are two major categories of state aid to education: general and special aids. The latter is a group of relatively small programs, generally experimental or aimed at meeting the special needs of a specific group of pupils.

General aid is paid to all school districts, with variations related to formulas taking into account such items as taxable property, income of district residents per pupil, and district size and organization. General aid includes:

- operating expense aid;
- BOCES aid;
- transportation aid;
- high tax rate aid;

- growth aid;
- building aid;
- reorganization incentive aid.

Operating aid, which represents more than one-half of total aid provided, is for support of the general operating expenditures of a district. Other general aid formulas exist to compensate for particular cost factors in school operations, building construction costs, high tax rates and transportation costs.

9.1.2.3 Federal Aid

The third largest revenue source, but one far smaller than state aid or local revenues, is federal aid. Federal assistance represented about $4.6 billion in revenues for the 2010-11 fiscal year, or 8.2 percent of total revenues.

9.2 Organizing for Fire Protection

Fire protection services in New York have long been viewed as an essential governmental function in densely populated areas. Early on, cities as well as many villages made provisions for fire departments and the organization of fire companies using both career and volunteer services. This did not happen in towns, however, where sparse development made fire, while no less catastrophic to the individuals involved, a more personal than a communal threat.

Traditional fire protection in rural areas consisted of close neighbors forming bucket brigades. The era of the bucket brigade was followed by the formation of loosely-knit groups which accumulated rudimentary firefighting equipment. Such groups were the precursors to the modern-day volunteer fire companies, which have developed a high degree of organization and capability.

For many years volunteer fire companies supplied reasonably effective fire protection to rural areas without government assistance or support. Gradually, however, greater demands for fire protection service, the high cost of modern and specialized equipment, and the need for giving volunteers economic security in the event of duty-connected death or injury, forced the independent fire services to request assistance from the government.

In towns, the answer came through the establishment of special districts on an area-by-area basis. These districts took two basic forms: fire districts, which were true district corporations and enjoyed autonomy from town government; and other types of districts, including fire protection districts, fire alarm districts and certain water supply districts, which were little more than assessment areas that received fire protection.

9.2.1 Fire Districts

A fire district is a public corporation established for the purpose of providing fire protection and responding to certain other emergencies. The New York State Constitution (Article X) recognizes that fire districts have certain characteristics of general purpose municipal corporations, such as powers to incur indebtedness and to require the levy of taxes. Generally, fire district taxes are levied by the county and collected by the town or towns where the district exists. A fire district is almost a completely autonomous political entity; it has its own elected governing body, its own administrative officers, and it must observe its own expenditure limitations. However, it is dependent upon the parent town or towns for its initial creation and extension pursuant to Article 11 of the Town Law; to consolidate or dissolve, a fire district must follow the procedures in Article 17-A of New York State General Municipal Law.

As of December 31, 2010, New York had 864 fire districts. They are of varying sizes, including smaller districts with annual budgets of several thousand dollars and large districts, some of which feature departments that have both career and volunteer firefighters and annual budgets of several million dollars.

9.2.1.1 Establishment

A fire district is created to provide fire protection to areas of towns outside villages. Villages usually provide fire protection on their own. Towns and villages may establish joint town-village fire districts.

A town board may establish a fire district on its own motion or upon receipt of a petition from owners of at least 50 percent of the resident-owned taxable assessed valuation in the proposed district. Whichever method is used, the town board must hold a public hearing and determine that: all properties in the proposed district will benefit, all properties which benefit have been included and that the creation of the district is in the public interest.

If the town board decides to establish a district and proposes to finance an expenditure for the district by the issuance of obligations, it must request approval from the State Comptroller, who must first determine that the public interest will be served by the creation of the district and that the cost of the district will not be an undue burden on property in the district. If such approval is not required, a certified copy of the notice of hearing must be filed with the State Comptroller.

After a fire district has been established, the town board appoints the first temporary board of five fire commissioners and the first fire district treasurer. At the first election, five commissioners are elected for staggered terms of one to five years so that one term expires each year. At each subsequent election one commissioner is elected for a full term of five years. The fire district treasurer is elected for three years, although the office may subsequently be made appointive for a one-year term. A fire district secretary is appointed by the board of fire commissioners for a one-year period.

9.2.1.2 Operational Organization

After establishment and initial appointments by the town board, the fire district becomes virtually autonomous from the town in its day-to-day operations.

A fire district has only those powers that are expressly granted by statute, or which are necessarily implied by the statute. Unlike towns, villages, cities and counties, a fire district does not possess home rule powers.

The powers granted to a fire district board are extremely specific and narrowly limited. A listing of some of the more important and general powers granted to the board of fire commissioners in Town Law serves as a quick synopsis of many of the important areas of operation for fire districts:

- They shall have the powers to make any and all contracts for statutory purposes within the appropriations approved by the taxpayers or within statutory limitations;
- They may organize, operate, maintain, and equip fire companies, and provide for the removal of members for cause;
- They may adopt rules and regulations governing all fire companies and departments in the district, prescribe the duties of the members, and enforce discipline;
- They may purchase apparatus and equipment for the extinguishing and prevention of fires, for the purpose of the emergency rescue and first aid squads and the fire police squads;
- They may acquire real property and construct buildings for preservation of equipment and for social and recreational use by firefighters and residents of the district;

- They may construct and maintain fire alarm systems;
- They may purchase, develop, or contract for a supply of water for firefighting purposes; and
- They may contract to provide firefighting or emergency services outside the fire district where such services can be supplied without undue hazard to the fire district.

9.2.1.3 Financing

Fire districts are not governed by the constitutional tax or debt limits that restrict most municipal corporations. However, statutory limitations are imposed on their spending and financing authority.

Under section 176(18) of the Town Law, every fire district has a minimum basic spending limitation of $2,000, plus an additional amount related to full valuation of district taxable real property in excess of one million dollars. Several important expenditures are exempt from this spending limitation, such as certain insurance costs, salaries of career firefighters, most debt service and contracts for fire protection or water supplies. The basic spending limitation may be exceeded only if a proposition for the increase is approved by the voters of the district. Further, many capital expenditures proposed for a fire district, which would exceed the spending limitation, also require voter approval. Certain expenditures which are not chargeable to the spending limitation may also be subject to voter approval under other provisions of law (e.g., General Municipal Law §6-g, relative to capital reserve funds).

A fire district may incur debt by issuing obligations pursuant to provisions of the New York State Local Finance Law. Fire districts are subject to a statutory debt limit (generally three percent of the full valuation of taxable real property in the fire district) and mandatory referendum requirements.

Within the statutory constraints, the district has general autonomy in developing its budget. When completed, the budget is filed with the town budget officer of each of the towns where the district is located. The town board can make no changes in a fire district budget and must submit it with the town budget to the county for levy and spreading on the town tax roll. When the taxes are collected, the town supervisor must turn over to the district treasurer all taxes levied and collected for the fire district.

In 1956, the Volunteer Firefighters' Benefit Law was enacted to provide benefits similar to those provided by Workers' Compensation for volunteer firefighters injured, or die from injuries incurred, in line of duty. Cities, towns, villages and fire districts finance these benefits through their annual budgets.

9.2.1.4 Fire Department Organization

The board of fire commissioners exercises general policy control over its fire department, while the chief of the department exercises full on-line authority at emergency scenes. The fire department of a fire district encompasses all fire companies organized within the district, together with career employees who may be appointed by the board of fire commissioners. Fire companies usually are, but need not be, volunteer fire companies incorporated under the provisions of the Not-for-Profit Corporation Law. They can be formed within the fire district only with the consent of the board of fire commissioners and, thereafter, new members can only be admitted with board consent.

All officers of the fire department must be members of the department, residents of the state and, if required by the board of fire commissioners, residents of the fire district. Officers are nominated by ballot at fire department meetings, and appointments by the board can be made only from such nominated candidates.

9.2.1.5 Joint Fire Districts in Towns and Villages

Article 11-A of the Town Law and Article 22-A of the Village Law allow for the establishment of joint fire districts in one or more towns and one or more villages. Under the provisions of the Town Law, if it appears to be in the public

interest, the town board(s) and village board(s) shall hold a joint meeting for the purpose of jointly proposing the establishment of a joint fire district. If, at the joint meeting, it is decided by majority vote of each board to propose a joint district, the boards must hold, upon public notice, a joint public hearing at a location within the proposed district. If, after the public hearing, the town board(s) and village board(s) determine that the establishment of the joint fire district is in the public interest, each board may adopt a separate resolution, subject to a permissive referendum, establishing the joint fire district.

The new joint fire district established pursuant to Article 11-A of the Town Law is governed by the provisions of Article 11 of the Town Law unless there is an inconsistency between the two articles. In such case, Article 11-A would provide the prevailing language. Management of the affairs of joint fire districts is under a board of fire commissioners composed of between three and seven members, who are either appointed by the participating town boards and/or village boards of trustees in joint session, or elected as provided in Article 11.

Upon the establishment of a joint district, the town board or village board of trustees of each participating municipality shall by local law dissolve any existing fire, fire alarm or fire protection districts contained within the joint fire district. The board of trustees of a village or the board of commissioners of a fire district, all of the territory of which is embraced within the boundaries of a joint fire district, may by resolution authorize the sale or transfer of any village-owned or district-owned fire house, fire apparatus, and fire equipment to the joint district. Such transfer may occur with or without consideration, and subject to the terms and conditions deemed fitting and proper by the board of trustees or board of commissioners.

9.2.2 Fire Protection and Fire Alarm Districts

Fire protection districts and fire alarm districts are not public corporations. Both types of districts may be described as assessment areas within which a town can provide limited services and assess the cost back against the taxable properties within the district.

Fire protection districts are established for the sole purpose of providing fire protection by contract. After establishing a fire protection district, a town board may contract with any city, village, fire district or incorporated fire company maintaining suitable apparatus and appliances to provide fire protection to the district for a period not exceeding five years. A town may also acquire apparatus and equipment for use in the district and may contract with any city, village, fire district or incorporated fire company for operation, maintenance and repair of the apparatus and equipment and for the furnishing of fire protection in the district. The cost of the contracted services, together with certain other expenses incurred by reason of the establishment of the district, is then levied against the properties of the district on the annual tax roll.

Fire alarm districts are formed primarily to finance the installation and maintenance of a fire alarm system. However, a town board can contract for fire protection for these districts in a manner that is similar to the way it provides protection for fire protection districts.

9.3 Public Benefit Corporations

9.3.1 The Nature of Public Benefit Corporations

Public benefit corporations and other special purpose entities created for specific limited public purposes are often referred to as authorities. Many of these entities, however, carry other terms within their titles such as commissions, districts, corporations, foundations, agencies or funds. For the sake of clarity, this chapter limits discussion to municipal level authorities and special purpose entities.

The first public authority in New York State was created in 1921 by an interstate compact that required the approval of the United States Congress. However, the idea of public benefit corporations or local authorities with

independent powers, including the ability to incur debt and by extension the power to levy taxes in order to retire debt, was not quickly embraced by the public. In 1956, only 90 such entities existed in the state. As of 2012, 1266 such entities, including local housing authorities, urban renewal agencies, industrial development agencies and others, filed separate financial statements with the Office of the State Comptroller.[2]

Table 9.2: Local Authorities and other Special Purpose Entities [4]

Type	Number of Entities
Housing authorities	143
Parking authorities	7
Urban Renewal Agencies	46
Industrial Development Agencies	112
Public Libraries	403
Library Systems	23
Association Libraries	354
Soil & Water Conservation Districts	58
Other Town Special Districts	70
Consolidated Health Districts	50
Total	1266

The traditional purpose of the public authority was to construct, operate and finance specific types of improvements. This concept has broadened, however, and many authorities now exist to meet such diverse needs as housing, parking, water supply, sewage treatment, industrial development, solid waste management, urban renewal, transportation, and community development.

9.3.2 Objectives

Public benefit corporations have been created for a number of reasons, including to:

- overcome jurisdictional problems in the operation of facilities or services that are best provided on a regional, interstate or even international basis;
- provide an administrative entity with the ability to operate and manage public enterprises, without being subject to many of the limitations which apply to the operations of the state and its political subdivisions;
- facilitate a transition from private to public operation;
- finance public improvements or services by using rents or user charges from the improvement or service itself without having to levy additional taxes;
- permit the use of revenue bonds (secured by revenues which the improvement) in order to finance the project, rather than general obligation bonds of a municipality;
- permit financing without being subject to voter approval or constitutional debt limit restrictions; and
- provide a vehicle which can take advantage of certain types of federal grants and loans that are not easily available to general purpose municipal corporations.

[2] Office of the State Comptroller, 2013

[4] Entity totals reflect units (not including joint activity units or component units) that file separate financial statements with the Office of the State Comptroller. Note: Housing Authorities are not required to file financial statements with the Office of the State Comptroller.

9.3.3 Powers and Restraints

Public benefit corporations have many of the same powers as general purpose governments, plus some powers that are not enjoyed by general purpose governments. In addition, authorities are not subject to some of the traditional constitutional and statutory restraints imposed upon general purpose governments, such as:

- constitutional debt limitations, but they may be subject to statutory limits set forth in their own enabling legislation;
- provisions of the State Finance Law or the Local Finance Law relating to the issuance and sale of obligations, except to the extent provided in their enabling legislation, and they have greater flexibility in scheduling debt payments;
- the type of public bidding provisions applicable to state and municipal governments.

The power of each public benefit corporation is set forth in its own legislative authorization. The tendency has been to put some of the requirements applicable to general purpose governments (such as the requirement for public bidding) into the special acts establishing authorities, although often in different forms. In addition, several provisions of the Public Authorities Law contain requirements applicable to all or a class of authorities, such as requirements to adopt investment guidelines and rules for awarding personal services contracts. However, the basic financial provisions that distinguish authorities from municipalities, again subject to the requirements of their own special acts, have been kept reasonably intact. Since enhanced fiscal powers often are the most important incentive for using authorities to provide public services, it is useful to explore these powers in greater depth.

9.3.4 Fiscal Powers

Authorities generally have one fiscal limitation that distinguishes them from municipal corporations. No authority may be established having both the power to incur debt and the power to levy or require the levy of taxes or assessments.[5] This is a constitutional power generally reserved for true municipal corporations. Also, an authority cannot be created with both debt-incurring power and the power to collect rentals, charges, fees or rates for services provided, except by special act of the State Legislature.

Generally, an authority may not be created within a city with power to both contract indebtedness and to collect charges from owners or occupants of real property within the city for a service formerly provided by the city, without approval of the electorate.[6]

Subject to these restrictions, authorities may use their fiscal power to finance their authorized functions. They sometimes may even finance improvements and services that cannot be provided directly by the municipal corporations included in the area of the authority. They also often enjoy the same income tax exempt status as municipal corporations on the interest on their obligations. In consideration of these factors, many municipalities to turn to authorities to provide capital-intensive improvements or services.

In the issuance of their financial obligations, authorities generally are not bound by the maturity and certain other requirements in the provisions of the Local Finance Law. Authorities, on the other hand, may have to pay somewhat higher interest rates to borrow money, since their obligations are secured by prospective revenues only and are not backed by the full faith and credit of a municipal corporation with the ability to levy taxes.

Neither the state nor any municipality may become liable for the payment of the obligations of any authority. However, the state or a municipality, if authorized by the Legislature, is not precluded from acquiring the properties of an authority and paying its indebtedness.

[5] State Constitution, Article VIII, section 3
[6] State Constitution, Article X, section 5

Chapter 10

Citizen Participation and Involvement

If the American system of government is to function properly, citizens must actively participate in its operations at all levels, but especially at the local level. Local officials have both a responsibility and a stake in keeping citizens fully informed about local programs and activities and giving them clear opportunities to play meaningful roles in determining local public policy and in carrying it out.

The history, tradition, development and patterns of local government in New York State are based on a belief that a responsive and responsible citizenry will maintain a vigorous, informed and continuous participation in the processes of local government. A basic principle upon which New York local government, with its broad home rule authority, is constructed is that local community values can be fostered and served. Assuring meaningful participation by citizens in government at all levels in the face of the complexity of contemporary society is one of the great challenges of American democracy.

The individual citizen has numerous ways to influence government. Some of these, such as writing letters to public officials, joining interest groups and supporting lobbying efforts, are of a private nature. The structure of government itself, however, provides other avenues of a more formal character. These include applications of the electoral process through which citizens may express their interests and concerns, plus devices such as public hearings and open meetings of legislative bodies. All local officials have a basic duty to assure that citizens have ways to participate actively and meaningfully in local government affairs. Apart from making themselves accessible to their constituents, local officials can keep citizens informed about public affairs, and the citizens, in turn may express their will through the electoral process.

10.1 The Electoral Process

Abroad base of participation in local government forms the foundation of our working democracy, and the electoral process is only one of many ways in which the individual citizen can make his or her views felt at the local level.

10.1.1 Elective Offices

At the turn of the twentieth century, enlightened citizen groups recommended adoption of the short ballot along with several electoral reforms. They believed that a citizen could acquire more knowledge about candidates and issues and could therefore vote more intelligently if fewer offices appeared on the ballot. They argued further that the voter's basic concern lay with choosing officers who would make policy rather than filling jobs of an administrative or even clerical nature in which there was no decision-making authority. Despite some improvements

during the past century, the length of a ballot still seems to depend on the proximity to the citizen of the governmental level — national, state and local. In the American three-branch system of government, the minimum ballot would include a chief executive (or two), one or more legislators, and perhaps judges. At the state level, the ballot may also include the offices of attorney general, state comptroller or auditor, and others. At the local level, the ballot grows to include such miscellaneous offices as town clerk, superintendent of highways and others.

New Yorkers, in their local elections, have to vote for officers to serve in two, three, or even more different local governments. A city resident will, for example, be voting for county and city and often school district officials. A village resident will be voting not only for village officials but also for county, town and school district officials. A resident of the town outside the area of the village may be voting in a fire district election as well as in county, town and school district elections. Although there are infinite variations, the most typical elected local officials appear in the following list.

- County
- executive (charter county only)
- county legislators(s) (except in counties retaining boards of supervisors)
- county clerk
- county treasurer
- Coroner[1]
- comptroller
- sheriff
- district attorney
- county judge
- family court judge
- surrogate
- City
- mayor
- comptroller
- council members
- municipal judges
- Town
- supervisor
- board members
- justices
- town clerk

[1] Duties are performed by an appointive officer in some counties.

- superintendent of highways
- receiver of taxes or tax collector
- assessors[2]
- Village
- mayor
- trustees
- justice(s)

10.1.2 Legislative Elections

During the 1960s and 1970s, many counties changed their governing body from a board of supervisors to a county legislature, with representation based on districts. In those counties, town residents have to vote for one or more county legislators in addition to the town supervisor, who formerly served ex officio as the town's representative on the county legislative body. Counties with county legislatures elect legislators from single or multi-member districts, or a combination of single and multi-member districts. Cities elect members of the city council at-large, or from wards or districts, or both at-large and from wards or districts. Towns elect members of the town board at-large, or from wards that have been established pursuant of Town Law section 81. A few villages operate on a ward system.

10.1.3 Fire District Elections

Elections in fire districts generally occur pursuant to the Town Law, and each fire district elects five commissioners and a treasurer at large. Chapter 9 [91] discusses these officials in a greater detail.

10.1.4 School District Elections

With certain rare exceptions, all local school board members in New York are elected. The method of election varies from district to district. In all school districts that elect their board members, however, the citizens of the entire district elect all board members at large. The number of school board members prescribed by state law varies from one or three for common school districts to not more than nine for union free, central and city school districts (see Chapter 9 [91] for a more complete discussion of school boards). In most cases, the district has some latitude to decide upon the number of board members. Terms are staggered so that the entire board is never up for election at the same time.

10.1.5 Improvement Districts

In some towns, residents also elect boards of commissioners for independent improvement districts. Since it has not been possible to create additional independent districts under the Town Law since 1932, elections continue only in those districts which continue to exist.

[2] Appointive in some towns. As counties and cities adopt and revise charters, the trend is toward fewer elective offices. Changes in state legislation and expanded powers of home rule have also made it possible for towns and villages to reduce the number of elective offices by local action.

10.1.6 The Political Party System

State law provides for political party committees at the state and county level and other committees as the rules of the party provide. Generally, county committees consist of at least two members elected at primary elections from each election district within the county. As a practical matter, the party system is subdivided further into town committees and city committees. Many village elections and all school district and fire district elections are held on a nonpartisan basis, but town, county and (with a few exceptions) city elections are contests between local representatives of statewide parties.

In the absence of a primary election, candidates for local offices who are designated by party caucuses become the nominees, but a competing candidate who obtains the required number of voters' names on a petition can require that a primary be held on the statewide primary date. Primaries in New York State are closed, and voters must enroll in a party to be eligible to vote in that party's primary. Since 1967 permanent personal registration has been in effect statewide.

10.1.7 Election Calendar

Some municipal elections coincide with statewide elections, while others are also held in November, but in the "off" or odd-numbered years. In fact, a provision of the State Constitution requires that city campaigns for mayor not coincide with gubernatorial campaigns. An election may, however, be held in an even-numbered year if necessary to fill a vacancy in the office of the mayor. Village elections are generally held in March or June, but they may be held on any date the locality chooses. Except in cities, school district elections are generally held annually on the first Tuesday in May or June. Fire district elections are held annually on the second Tuesday in December.

Table 10.1: Election Calendar by Local Government Type

Type	Calendar
State	November even-numbered year
County	November odd-and even-numbered year
City	November odd-numbered year
Town	November odd-numbered year
Village	March or June annually or biennially
School District	May or June annually
Fire District	December annually

10.2 Referenda

The use of the referendum — direct vote of the people on issues — has been limited in New York State in accordance with the basic principles of a representative form of government. On the principle that voters elect government officials to make decisions on their behalf, government officials are not given broad authority to delegate decision making powers back to the electorate. Case law stipulates that a local government must find specific authority, either in the constitution or state law, to conduct an official referendum on any subject, and in the absence of such authority it may not conduct a referendum. A local government may not spend public monies to conduct a so-called "advisory referendum," one conducted to gather public opinion on a particular matter, unless state law specifically authorizes it.

10.2.1 Types of Referenda

There are general classifications of referenda available to local governments in New York State. These are mandatory, permissive, on petition and discretionary.

A mandatory referendum is one which is required and in which a local government has no choice; it must submit the particular question to referendum.

A permissive referendum is one in which the local governing body is authorized to place a matter before the voters on its own motion. Or, after the local governing body renders a decision on the matter, it may be required to wait a specified period of time (after public notice of the decision) before the matter is finally decided. During that interval, a petition may be filed demanding that the local governing body may submit the matter to referendum for a public decision. A proper petition, as defined by law, must be filed within the timeframe, set forth by law.

Referendum on petition relates to situations in which a proper petition may be circulated and filed, as defined by law, directing the local government body to schedule a referendum on the subject matter of the petition. A discretionary referendum, the most flexible variety, allows the governing body to determine whether a particular action under consideration shall be subject to referendum and if so, whether mandatory or permissive.

10.2.2 Referendum Majorities

There are a few instances in which more than a simple majority is required for the approval of a question submitted to the voters. Perhaps the most important of these is the requirement for adoption of a county charter. This requires a majority vote in any city or cities in the county and a majority vote outside the city or cities (i.e., towns). If a charter provides for the transfer of any function from the villages to the county, a majority vote in the affected villages is also required.

10.2.3 Subjects of Referenda

Generally local governments are required to conduct a referendum on any question involving basic changes in the form or structure of government, such as county or city charter adoption, changes in boundaries or in the composition of legislative bodies, and the abolition or creation of elective offices.

Procedures relating to permissive referenda must be observed in counties and cities, as well as in towns and villages, for such matters as appropriating money from reserve funds and constructing, leasing or purchasing a public utility service. In towns, permissive referenda are required for changes from second to first class if the town has between 5,000 and 10,000 in population. A permissive referendum is also required for a change from first class to suburban town status. Such actions by towns are roughly equivalent to charter adoption by a county or city, which is subject to mandatory referendum. The towns, however, are more generally bound by referendum requirements than any other type of local government unit. For example, towns, but not other units, are subject to permissive referenda when constructing, purchasing or leasing a town building or land there for and when establishing airports, public parking, parks, playgrounds, and facilities for collection and disposal of solid wastes.

Local laws of counties, cities, towns and villages are subject to referenda on petition if they result in changes in existing laws relating to such matters as public bidding, purchases, contracts, assessments, power of condemnation, auditing, and alienation or leasing of property.

The creation of improvement districts in both towns and counties is a frequent subject of referenda. The referendum for a county water, sewer, drainage or refuse district is permissive. A town improvement district can be established either on petition and action of the town board or by motion of the town board and with a permissive referendum held in the area to be included in the district.

In practice, matters subject to permissive referenda or referenda on petition are seldom actually brought to referenda, unless they become the subject of particular local controversy. Matters subject to referenda in recent elections have included:

- county charter adoption;
- increases in terms of local offices from two to four years;
- city charter amendments or revisions;
- county reapportionment plans;
- transfer of street-naming authority from cities, towns and villages to a county;
- change from at-large elections to the ward system;
- village incorporation;
- coterminous town-village; and
- village dissolution.

10.2.4 Initiative and Recall

New York State law does not recognize the principle of recall, by which an elected officeholder may be removed by a popular vote. There are very few instances in which there may be initiative, where the voters initiate and enact laws or constitutional amendments. Although not strictly an example of the initiative, citizens in New York may, by petition, require a referendum on certain actions taken by a local governing body. There are also instances in which a petition can initiate official action. The voters of a county may, by petition, require the submission of a proposition at a general election on the question of appointment of a charter commission. If approved by the voters, the county legislative body must appoint a commission.

Voters of a city may, by petition, require submission of a city charter amendment or new city charter to the electors. Since the substance of such a local law must be set forth in full in the petition, this procedure is similar to the initiative as it is known in other states. Voters in Suffolk County may, through an initiative and referendum procedure, enact amendments to the county charter. A special Act of the State Legislature provided authority for this power.

10.3 Facilitating Citizen Participation

10.3.1 Boards and Commissions

Since school board members and fire district commissioners are unpaid volunteers, and since many other local officials in New York State, including some chief executive officers and legislators, receive nominal salaries, they embody citizen participation in government. However, the growing responsibilities of local officials make it more difficult to operate local governments effectively with part-time leadership.

Citizens of New York State have many opportunities to participate in local government as members of advisory or operational special-purpose agencies, such as planning boards, environmental councils and recreation boards, to name a few. These agencies offer local officials opportunities to enlist the talents, interest and concern of the community in important aspects of local government. In addition to the many special agencies authorized by state law, local chief executives and legislative bodies have authority to establish and appoint ad hoc citizens'

advisory committees on numerous matters, such as reapportionment, historical celebrations and new municipal buildings. A municipality may also, if it wishes, have a continuing citizens' advisory committee to consider a variety of matters as they arise.

There are many reasons for local officials to encourage citizens to participate actively in their local governments, including:

- involvement of citizens in the planning stages of a program or project so as to avoid misunderstandings and problems at later stages;
- obtaining firsthand knowledge of citizen needs and problems;
- taking advantage of expertise which might otherwise not be available, especially in small communities;
- spreading the base of community support;
- improving public relations; and
- fulfilling the requirements of certain federal programs.

10.3.2 Public Hearings

The public hearing provides a convenient and useful forum for citizens to play a significant role in the governmental decision-making process. As a general rule, local governments in New York State are required to hold public hearings whenever the action of the governing body can be expected to have significant impact on the citizenry. For example, the law requires public hearings as part of the approval process for:

- local laws and ordinances;
- zoning regulations;
- capital improvements;
- budgets; and
- certain federal programs.

Local governing bodies may also conduct a hearing at any time on any subject on which they wish to obtain the views of the public. In addition, the Open Meetings Law (see "Public Information and Reporting" below) requires that all meetings of public bodies be convened open to the public and preceded by notice given to the public and news media.

The choice of whether to hold a hearing often depends upon striking a balance between democratic requirements and the interests of government efficiency. The choice may not be easy, but an informational hearing, even when not mandated, maybe advisable where the subject matter is particularly controversial.

10.3.2.1 Notice

Where there is a specific provision in law regarding notice of a public hearing, the notice should be sufficient to inform the public of the date, time, place and subject of the hearing. A small notice in a large newspaper, however, is often inadequate. When significant issues affect either a particular neighborhood or the entire community, public notices may be conspicuously displayed at several key locations in the jurisdiction affected. Public officials should write notices in a language that laymen can understand, rather than in legal language unfamiliar to most people.

Public officials should consult with the language of New York State's Open Meeting Law and the Committee on Open Government (https://www.dos.ny.gov/coog/) to ensure compliance and best practices.

10.3.2.2 Location

Although governments traditionally hold public hearings in a central municipal building, they frequently use other venues in the community to conduct hearings on issues affecting specific geographic locations. By so doing, they gain greater neighborhood participation and sharper focus of attention on an issue. Government decision makers are likely to learn more about a problem by visiting the area of the problem.

10.3.2.3 Statutory Provisions

There is no uniformity in state law with respect to public hearings and procedures. Specific provisions requiring public hearings and setting forth procedures to follow are generally spread out through the laws relating to the various types of local governments. In many cases the requirements for a hearing will vary depending on the section of law involved.

10.4 Public Information and Reporting

10.4.1 Freedom of Information Law

In 1974, the State Legislature enacted the Freedom of Information Law (Article 6, Public Officers Law). Subsequently, the law was substantially amended to provide the public with broad authority to inspect and copy records of state and local government. Under the Freedom of Information Law, all government records are available, except those records or portions of records that the law allows the government to withhold. In most instances, the law describes the grounds for denial in terms of potentially harmful effects of disclosure.

The Law created the Committee on Open Government, which consists of 11 members. The Committee includes the Secretary of State, in whose Department the Committee is housed, the Lieutenant Governor, the Director of the Budget, the Commissioner of the Office of General Services, six non-office holding citizens, and an elected official of a local government. The Governor appoints four of the public members, at least two of whom must be or have been representatives of the news media, and an elected official of a local government; the Speaker of the Assembly and the Temporary President of the Senate appoint one public member each. The Law enables the Committee:

- furnish to any agency advisory guidelines, opinions or other appropriate information regarding the law;
- furnish to any person advisory opinions or other appropriate information regarding the law;
- promulgate rules and regulations with respect to the implementation of the law;
- request from any agency such assistance, services and information as will enable the committee to effectively carry out its powers and duties; and
- report annually on its activities and findings, including recommendations for changes in the law, to the Governor and the Legislature.

Each agency in the state must adopt procedural rules consistent with (and no more restrictive than) the rules promulgated by the Committee on Open Government. In addition to rights of access to records generally, units of local government as well as state agencies must maintain and make available three types of records, including:

- a record of votes of each member in every proceeding in which a member votes;
- a record identifying every officer and employee by name, public office address, title and salary; and

- a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not the records are available (Note: It has been advised that municipalities, by resolution, may adopt the records retention schedule issued by the State Archives and Records Administration (SARA) as the subject matter list).

In a judicial challenge to a denial of access to records, the agency has the burden of proving that the records withheld fall within one or more of the grounds for denial. It has also been held that an agency may not merely assert a ground for denial and prevail; on the contrary, it must demonstrate that the harmful effects of disclosure described in the grounds for denial would arise.

Many local government records available for inspection under the Freedom of Information Law had been available under other earlier laws. The Freedom of Information Law also preserves rights of access granted prior to its enactment by other laws or judicial determinations. The existence of, and publicity given to, the law has also produced a greater uniformity of procedures in state and local government and increased the public's use of rights to obtain records.

10.4.2 Open Meetings Law

In 1976, the State Legislature enacted the Open Meetings Law (Article 7, Public Officers Law), which is applicable to all public bodies in the state (including governing bodies) as well as their committees, subcommittees and similar bodies. Later amendments to the Law clarified vague original provisions. The Open Meetings Law does not apply to: judicial or quasi-judicial proceedings (except proceedings of zoning boards of appeals); deliberations of political committees, conferences and caucuses; or any matters made confidential by federal or state law.

The Open Meetings Law provides the people with the right to observe the performance of public officials and attend, observe, and listen to the deliberations and decisions that go into the making of public policy. Just as the Freedom of Information Law presumes the public's right of access, the Open Meetings Law presumes openness. The deliberations of public bodies must be open to the public, except when one or more among eight grounds for executive session may appropriately be cited to exclude the public. The grounds for executive session are based largely upon the harmful effects of public airing of particular issues.

In a general statement of intent, the law asserts that every meeting of a public body shall be open to the public except when an executive session is called to discuss particular subjects that are listed in the law. The statute defines "executive session" as that portion of a meeting not open to the general public. Once in executive session, a public body may vote and take final action, except that any vote to appropriate public monies must be conducted in an open meeting.

When a meeting is scheduled at least a week in advance, public notice of its time and place must be given to the news media and posted in one or more designated public locations at least 72 hours before the meeting. Public notice of the time and place of all other meetings must be given to the public and the news media to the extent practicable at a reasonable time prior to the meeting.

Minutes must be compiled for open meetings and when action is taken during executive sessions. Minutes of executive sessions must be made available within one week; minutes of open meetings must be made available within two weeks. Minutes of executive sessions need not include information not required to be disclosed under the Freedom of Information Law.

Any aggrieved person has standing to enforce the provisions of the Open Meetings Law. If a public body has taken action in violation of the law, a court has the power to declare the action null and void. A court also has discretion to award reasonable attorney fees to the successful party in a proceeding brought under the law.

Public officials should consult with the Committee on Open Government (https://www.dos.ny.gov/coog/) to ensure compliance and best practices.

10.4.3 Records Management

A sound records management program enables local governments to create, use, store, retrieve and dispose of their records in an orderly and cost-effective manner pursuant to applicable state law. Such a program helps make records readily available to staff and the public, prevents the creation of unneeded records and promotes the systematic identification and preservation of records of long-term archival value. Article 57-A of the Arts and Cultural Affairs Law, the "Local Government Records Law", requires that the governing body of a local government "promote and support a program for the orderly and efficient management of records." It also requires that each local government designate a "records management officer." In towns and villages, the clerk is always the records management officer; in fire districts, it is always the district secretary. All other local governments have discretion on whom they may assign to the records management officers. Through its Local Records Section, the State Archives and Records Administration (SARA) Unit of the State Education Department provides information and assistance to help local governments (except New York City) improve records management and archival administration. It publishes records retention and disposal schedules that list the minimum time periods during which records of all units of local government must be retained.

The State Archives also produces publications, workshops, and web resources to help all local governments better manage all their records, including electronic records. The Archives maintains nine regional offices across the state to provide local onsite advice and direction on records management to local governments.

Information on the administration of court records is provided by the state's Office of Court Administration. Within New York City, information on municipal records management is provided by the City's Department of Records, though the Archives' publications and workshops are also available for use by New York City agencies.

10.4.4 Public Reporting

10.4.4.1 Annual Reports and Newsletters

In municipal reporting, a fine line separates the need to keep the public informed from the tendency to use public funds to aggrandize an incumbent administration. Although many municipalities in New York State publish and distribute annual reports and/or periodic newsletters, state law does not require them to do so. However, both the Town Law and the Village Law authorize expenditure of funds for publication and distribution of a report relative to fiscal affairs of the municipality. This can and has been interpreted to include most of the items usually incorporated in annual reports, such as programs and services, capital projects, and land or property acquisition. Towns and villages are not expressly authorized to include items, such as biographies of incumbent officers, which are clearly non-fiscal in nature.

10.4.4.2 Informal Reporting

There are many other ways for local officials to keep the public informed both through the media and through municipal resources. In addition to traditional press releases, municipalities use:

- municipal websites that include basic information, such as agendas of meetings, minutes, proposed local laws and the ability to communicate by e-mail with local officials;
- press conferences and media interviews;
- weekly radio or TV interview programs;
- slide shows or presentations on new municipal programs, or on the budget, for distribution to civic, professional or school groups;

- displays on public services and programs at schools, shopping centers, fairs and other public gathering places;
- prominent posting of time and place of meetings (including public hearings) of the legislative body;
- rotation of legislative body meetings to various neighborhoods or communities within the municipality;
- radio or cable television broadcasts of meetings of the legislative body;
- informational meetings on new programs and significant issues;
- information centers to direct citizens to appropriate agencies; and
- publication of materials, such as a directory of local officials and municipal services, newsletters on public services and programs, and brochures or folders on specific services.

Meetings of municipal boards are frequently televised by public access TV stations. Two-way cable television systems are available in some communities and may offer opportunities for local officials to make themselves directly accessible to citizen inquiries.

10.4.4.3 Media Relations

The media can be valuable to local governments. In addition to using the media for special programs, local officials should contact the press, radio and TV as a means of keeping the public informed about governmental programs. The experience of many local officials suggests that the best approach to the media is to be as open and free with information as possible, and not to avoid controversial issues.

10.5 Handling Citizen Complaints

In larger units of government, where citizens may not have easy access to elected officials or know where to go for assistance, problems can arise which may alienate citizens from their governments. Public reporting as discussed above can enhance the ability to solve communication problems between citizens and their government. While most problems can be resolved simply through better communication, some may be insoluble because the citizen expects government to act in a manner inconsistent with or not authorized by law. But even in that case, the citizen may gain satisfaction from having gained the attention of the government and learning that the difficulty involves compliance with law rather than reluctance on the part of the government.

Some local governments have established ombudsman programs to assist citizens with problems involving their agencies. In many cases though, citizen assistance is provided by staffs of local chief executives, municipal clerks, public information officers, members of local legislative bodies and other officials in the performance of their routine duties.

Chapter 11

Administering Local Finances

The financing of local government activities in New York takes place within a number of limitations. The State Constitution limits the amounts that most municipalities may raise annually from the real property tax. Similarly, the municipalities operate under limitations on debts, with a variety of provisions which limit borrowing power. The fiscal management of local government, spelled out in the Constitution and in statutes, is subject to certain prescriptions, reviews and audits by the state.

The previous chapter discusses local government expenditure trends, principal sources of revenues and aspects of intergovernmental fiscal relations. This chapter discusses the more prominent legal limitations upon local government financing, the basic features of municipal financial administration and state supervision of local finances.

11.1 Tax and Debt Limits

11.1.1 Tax Limits

Article VIII of the State Constitution imposes limitations upon the amounts which local governments may raise by tax upon real property. These limitations have a history that goes back more than a century. They have had a pronounced impact on the financing of local government in the State of New York, particularly with regard to state aid, local non-property taxes, education financing, general purpose assistance and special city aid. The real property tax limitation has evoked much debate over the years.

Against a background of increasing state involvement in local finances, an 1884 constitutional amendment declared:

> "The amount hereafter to be raised by tax for county or city purposes, in any county containing a city of over one hundred thousand inhabitants or any such city of the state, in addition to providing for the principal and interest of existing debt, shall not, in the aggregate, exceed in any one year two percent of the assessed valuation of the real personal estate of such county or city . . . "

Thus the tax limitation first applied only to the cities of New York, Brooklyn, Buffalo and Rochester, and to New York, Kings, Erie and Monroe counties. With the consolidation of New York City in 1898, a single 2 percent limit was accepted as applying to the whole city and later to the overlying county government. As a result of population growth, Syracuse, Albany and Yonkers came within the constitutional tax limit, and with them Onondaga, Albany and Westchester counties.

11.1.1.1 Tax Limit Developments

Many other cities of the state have been subject to tax limitation under special laws or local charters. By 1920 there were 33 cities in this category. Limitations ranged from 1 to 2 percent of assessed valuations or took the form of appropriation restrictions. In virtually every instance, taxes for school purposes and debt service, as well as other municipal functions in certain of the cities, were excluded from these limitations.

After the First World War, every city suffered from inflation, a serious factor in municipal finances even in the prosperous years of the 1920s. Some of the stringency experienced by the tax-limit cities, however, probably resulted from policies of under-assessment. At its outset, the depression created difficulties because it reduced the valuations by which taxing power was measured and imposed additional expenditures for public relief.

11.1.1.2 Amendment of 1938

A 1938 amendment revised the constitutional tax limitation by substituting five-year average valuations as the measure of taxing power for the then-current annual valuations. The 2 percent limit was extended in 1944 to all the cities and villages of the state, with the provision that the Legislature might exclude amounts raised by local property taxation for school purposes in the case of villages and of cities having a population of less than 100,000. The 1938 amendment granted the Legislature the power to further restrict the authority of any county, city, town, village or school district to levy taxes on real estate.

11.1.1.3 Current Limitations

Material changes were made in the tax limits contained in Article VIII of the State Constitution during the period following World War II. They were accompanied by a series of major moves in state-local fiscal relations as they related to the distribution of shared taxes, categorical assistance, school aid, local non-property taxes and city-school relations.

Tax limit provisions of the Constitution as amended in 1949, 1951, 1953 and 1985, now provided as follows:

1. All Constitutional tax limits relate to the five year average of the full value of taxable real estate.
2. The tax limit for New York City for combined city and school purposes is fixed at 2.5 percent.
3. The tax limits for the other cities with populations of 125,000 or more are 2 percent for combined city and school purposes.
4. In cities under a population of 125,000, the tax limit is 2 percent for city purposes alone.
5. All counties outside New York City are subject to tax limits of 1.5 percent for county purposes; however any county may raise its limit to 2 percent by action of the county governing body in accordance with County Law.
6. The limit for villages is 2 percent for village purposes.
7. In certain instances, taxes levied for financing capital expenditures on a “pay-as-you go” basis and amounts raised for debt service are excluded from tax limitation.
8. School districts in cities under a population of 125,000 and towns have no Constitutional tax limit.

It may be said that the Constitutional real estate tax limit has two major components: A percentage limitation for operating purposes as listed in items (a) through (f) above, and certain exclusions of amounts required for debt service and capital improvements. Together these may be referred to as the total real property taxing power of a municipality or a school district.

11.1.1.4 Tax Limit Exclusions Challenged

To enable school districts which are coterminous with, partly within or wholly within a city having a population less than 125,000 and the cities of Buffalo, Rochester and Yonkers to meet their fiscal needs, the legislature enacted a series of statutes permitting the exclusion of annual pension requirements and social security contributions from their respective tax limitations.

The constitutionality of the statute applicable to the City of Buffalo was contested in 1973 on grounds that pension payments are ordinary annual operating expenses and consequently subject to tax limitation. In Hurd v. City of Buffalo (34 NY2d 628, 355 NYS2d 369 (1974)), the Court of Appeals affirmed that the exclusionary statute specifically applying to Buffalo was unconstitutional. The court thereby cast a shadow over the other exclusionary legislation.

Beginning in 1974, the Legislature adopted a stopgap measure to forestall the immediate impact of what has come to be known as the Hurd ruling. A Temporary State Commission on Constitutional Tax Limitations (the Bergan Commission) was created to pursue the matter.

The commission published its findings at the beginning of 1975, recommending that the issue be handled through a constitutional amendment. An amendment excluding retirement and social security costs from the tax limit was submitted for voter approval at the 1975 general election. It was defeated.

The 1976 Legislature passed a bill (Emergency City and School District Relief Act) continuing temporary relief to the cities of Buffalo and Rochester and to certain school districts by permitting them to exclude from Constitutional tax limitations certain pension and social security contributions until 1980.

In early 1978, the Court of Appeals struck down the Emergency City and School District Relief Act of 1976 and left the door open for a suit demanding a refund of tax dollars collected under the faulty legislation. In response to this decision, a special Task Force on the Financing of City School Districts was created. The Legislature implemented two principal recommendations of the task force in 1978: (1) It instituted special equalization ratios for the impacted cities and school districts and, (2) it advanced state funds to finance the "gap" on a revolving basis.

The special equalization ratios initially reduced the gap from $112 million to $20 million. However, as the growth of the cities' real property wealth has slowed down, the usefulness of these ratios has diminished. The state funds which were advanced to the districts impacted by Hurd were rolled over every year between 1978 and 1992-93. Pursuant to Chapter 53 of the Laws of 1991, advances to the districts were reduced by 50% a year and phased out in 2011-12. In addition, the state has provided these districts with grants since 1979.

Other recommendations of the Task Force were:

- require city school districts receiving advances to make maximum use of sales and utility taxes;
- redistribute or increase county sales taxes for city school district use;
- reallocate functions;
- adopt a statewide real property tax; and
- submit constitutional amendments.

11.1.2 Debt Limits

The economic collapse of 1837 exposed serious weaknesses in the credit operations of local government and the speculative character of the public improvement debt of the period. One result was that the State Constitution of 1846 directed the Legislature to restrict the municipalities' power of taxation, assessment and borrowing.

Unchecked growth in the debt of local governments continued. The Civil War was followed by inflation and great economic activity. New York City provided a special example of municipal extravagance. The unbridled expansion of local debt under Boss Tweed created acute difficulties for the city during the business depression of 1873.

11.1.2.1 Debt Limit Developments

The condition of local government finance became a matter of urgent interest to the state. A Constitutional amendment in 1884 imposed a debt limit of 10 percent of assessed valuation on cities with a population over 100,000 and on counties containing a city of the same size. In the case of New York City, the effect was a 10 percent limit on combined city and county debt, while in Brooklyn, Buffalo and Rochester the limit applied separately to city and county debt. Water debts extinguishable within 20 years were excluded.

In 1894, the 10 percent debt limitation was extended to all cities and counties in the state. No provision was made for the limitation of the indebtedness of towns, villages and school districts, although these units were restricted in their debt practices by statute.

11.1.3 Current Debt Limitations

In 1938, constitutional amendments extended debt limitation to towns and villages, prohibited the creation of new or novel units of local government possessing borrowing power, and required substantive guarantees for the repayment of municipal indebtedness.

Postwar changes in the debt provisions of the State Constitution have been numerous. The most significant occurred as a result of revisions in Article VIII which were approved in 1951. The 1938 and subsequent revisions resulted in the following features:

- All Constitutional debt limitations tied to specified percentages of the average full valuations of taxable real estate on the last completed assessment rolls and the four preceding rolls, as follows:
  - 10 percent for Nassau County;
  - 7 percent for other counties outside New York City;
  - 10 percent for New York City for combined city and school purposes;
  - 9 percent for other cities with a population of 125,000 or more for combined city and school purposes;
  - 7 percent for cities with a population of less than 125,000 for city purposes, exclusive of schools;
  - 7 percent for towns;
  - 7 percent for villages; and
  - 5 percent for school districts coterminous with, partly within, or wholly within a city with a population of less than 125,000 (with provisions for increasing the limit under certain conditions).
- A series of specific conditions governing the incurrence and management of municipal debt, such as:
  - prohibition upon the issuance of indebtedness beyond a period of probable usefulness or weighted period of probable usefulness to be specified by state law, and in no case to exceed 40 years;
  - issuance only of full faith and credit indebtedness and “tax increment financing” (Article XVI, section 6);
  - authorization for sinking fund bonds under certain circumstances and a requirement for the repayment of debt in installments, with no installment more than 50 percent in excess of the smallest prior installment, unless the governing body provides for substantially level or declining debt service payments as may be authorized by law;
  - requirement for the annual provision by appropriation for meeting principal and interest payments; and
  - prohibition upon the creation of municipal or other corporations (other than a county, city, town, village, school district, fire district or certain river regulation and drainage districts) possessing the power both to contract indebtedness and to levy or require the levy of taxes or benefit assessments upon real estate.

- Exclusions of municipal indebtedness from constitutional debt limitation, including certain water and sewer debt, certain debt issued to finance “self-liquidating” public improvements, and, in the case of New York City, certain additional exclusions for various purposes.

- Prohibitions upon the gift or loan of the credit of counties, cities, towns, villages or school districts to or in aid of any individual, public or private corporation or association or private undertaking with specified clarifications and an exception in the case of joint or certain cooperative undertakings among municipalities.

Article XVIII of the State Constitution prescribes the conditions under which a city, town, village or certain public corporations (other than a county) may aid certain low-income housing and nursing home accommodations, contract indebtedness, and provide for subsidies for these purposes. This article contains a separate 2 percent debt limit for cities, towns and villages computed on the basis of average equalized full valuations of taxable real property. Various conditions are attached to indebtedness incurred under Article XVIII.

11.2 Borrowings and Debt Management

11.2.1 Local Finance Law

To implement the 1938 constitutional amendments, the state undertook a comprehensive revision of the laws on local government financial affairs. In 1942, this effort produced the Local Finance Law. This statute regulates the issuance of municipal bonds and notes by local governments. It addresses the objects or purposes for which debt may be incurred, the maximum terms of indebtedness for various objects or purposes, the conditions of short-term loans, and the required content of municipal obligations.

11.2.2 Debt Management

While there are many legal requirements surrounding municipal debt procedures, they do not exhaust the subject of local debt management. The overlapping debt limits in the State Constitution and the safeguards and requirements of the Local Finance Law are necessarily controlling, but they are not substitutes for the exercise of prudence and sound judgment by local government officials.

Local officials may exercise discretion in debt management and borrowing policies in a number of vital respects. They make judgments as to the need for public improvements and their soundness from the standpoint of design, costs and architectural or engineering features. They decide whether such improvements are within the capacity of the community as measured by future annual costs for debt service and regular maintenance.

While state laws influence debt policies, the decisions of local officials have a direct bearing upon debt management. One feature of an orderly and manageable debt structure is early retirement of substantial amounts of outstanding debt. Another feature is to keep annual obligations for the payment of interest and principal within the limits of a reasonable relationship to total budgetary requirements. Local officials also find that it is good policy to make substantial contributions to the cost of public improvements from current revenue. Many capital outlays recur regularly, such as replacing motorized equipment or resurfacing streets, and borrowing for such purposes tends to effect on debt and debt charges.

The issuance and marketing of municipal obligations is a highly specialized subject. Since local officials wish to ensure the legality and marketability of the obligations and obtain the most favorable terms, they often utilize the services of bond counsel and other knowledgeable advisors.

11.2.3 Capital Programming

Capital programming and capital budgeting are recognized methods for implementing debt management policies. Practices among local governments in the state vary. In some cases there are detailed charter requirements for public improvement planning and financing. In other cases localities adhere to “paper” plans. Sometimes the local practice is to bring forward public improvements piecemeal and not necessarily in relation to each other, to separately authorize the funds necessary to pay for various improvements, and to defer into the future the question of how everything fits together.

A capital program, as the term is used by the Government Finance Officers Association (GFOA), is “a plan for capital expenditures to be incurred each year over a fixed period of years to meet the need for public improvements.” General Municipal Law, section 99-g contains express provision for capital programs. The capital program under section 99-g is submitted with the municipality’s regular annual budget. The capital program itself includes descriptions of proposed projects, the proposed method of financing for each project and an estimate of the effect, if any, on operating costs in the three years following the completion of the project. The factor of integration with the regular budget removes capital programming from the area of paper plans.

The goal of a capital program generally is to plan, in advance, how to pay for various improvements and how the improvements will affect the regular municipal budget in added debt service charges, appropriations from current revenue, and the annual expense of operating new facilities.

11.2.4 Debt Trends

Local government indebtedness is evaluated on an individual basis according to criteria by which financial position is customarily evaluated. Some areas of concern are growth in the amount of debt over a number of years, and purposes for which the debt is being issued. Local budgets traditionally include expenditures for which indebtedness could be issued. When local governments take expenditures that have traditionally been financed from current appropriations and begin to issue debt to finance such expenditures, it may be an indication that current revenues are not keeping pace with expenditures.

Other criteria extend beyond amounts of borrowings and debt and involve a number of factors indicative of fiscal capacity. A few such factors are the ratio of net debt to full valuations, the extent to which municipal debt is wholly or partially self-supporting, the relative amount of the municipal budget used for tax-supported debt, the amount of overlying debt, and the municipality’s tax collection.

11.3 Municipal Finance Administration

The general laws of the state are fairly explicit as to the powers and duties of local officials having fiscal responsibilities in non-charter counties, towns and villages. These statutes provide options as to the manner in which these responsibilities are assigned or organized within the structure of local governments. Options include the establishment of the office of comptroller and purchasing agent in counties, the office of purchasing director in towns and the office of auditor in villages. Pursuant to home rule authority, cities, charter counties and charter villages have latitude to amend their charters with respect to organization for finance administration.

Local government accounting, bookkeeping and record management systems vary in sophistication from simple manual systems to individual personal computers, to client server and mainframe systems. Software includes off-the shelf applications and custom applications designed to accommodate specific needs. A wide variety of software products are available to provide basic aspects of fiscal management such as budget preparation, appropriation accounting, assessment rolls preparation, payrolls, master employee records, real property tax billing and water billing.

Earlier discussion touched upon real property tax administration and municipal debt management. Further phases of municipal finance administration include budgeting, accounting, treasury functions, purchasing and contracting and audit procedures.

11.3.1 Municipal Budgeting

Local officials often regard the annual budget as perhaps their greatest single obligation, since budget preparation and continuing administration may be labor intensive and time-consuming. General state law spells out the principal steps in budget preparation and adoption in most local governments. For counties, cities and villages that have charters, budget provisions are generally contained in such charters.

The budget process generally entails many choices. These tend to be most apparent on the expenditure side of the local budget, but many choices may also exist on the revenue side. They include:

- magnitude of the real property tax levy and its relative burden expressed as a tax rate;
- local non-property taxes, as authorized by state law and implemented by local action;
- fees and earnings and use of special assessments, which are in the nature of charges against benefited properties in proportion to the benefit received, to defray the cost of certain municipal improvements or services;
- payments from other governments in the form of grants-in-aid, shared revenues and reserve fund moneys for current or capital purposes (depending upon the character, scope and availability of these payments); and
- indebtedness for authorized capital purposes, paying for improvements from current revenues (pay-as-you-go), or employing a combination of these methods of financing.

11.3.2 Budget Administration

Budget administration is generally preceded by the preparation and submission of departmental estimates. This process is usually followed by the formulation of the budget itself, which is a balanced plan of expenditures and revenues, normally prepared by or under the direction of the local government's executive or budget officer. The budget is then submitted to the local legislative body for review, approval or amendment, and enactment of appropriation orders giving effect to the budget.

Beyond the legislative phase of budget review and adoption is the stage of budget administration and enforcement. This process involves the maintenance of appropriation control accounts and procedures for budget transfers or modifications.

11.3.3 Local Initiatives

In budget preparation, presentation and subsequent administration there are opportunities for local initiatives, consistent with the basic requirements of law. Initiatives may be expressed in budget format, supporting data and comparisons, and accompanying explanatory matter in the budget message. A budget is more than an array of figures — it is also a statement of public policy.

Quite often, budgetary allotments or expenditure quotas are established. These are often made on at least a quarterly basis, are formulated from work programs or activity schedules, and developed in consultation with operating officials. Newer developments in budgeting relate the provision of money more closely to the accomplishment of program objectives and to the efficiency with which municipal activities are performed.

11.3.4 Accounting Control

Another essential aspect of municipal finance administration is the maintenance of an accounting control system. Fund accounting is a basic characteristic of municipal accounting. A "fund" is a fiscal and accounting entity with a self-balancing set of accounts. It contains recorded cash, other assets and financial resources, together with all related liabilities and residual equities or balances. A fund is segregated for the purpose of carrying on specific activities or attaining certain objectives in accordance with special regulations, restrictions or limitations.

Municipal accounting systems include a general fund and, depending upon the local government entity, such special revenue funds as highway funds, debt service funds, capital project funds, enterprise funds, internal service funds, and trust and agency funds. The central principle is that funds will be self-contained.

Accounting for municipal resources and expenditures should generally be on a modified accrual basis. A fundamental feature of budget administration is the maintenance of appropriation control accounts whereby appropriations are encumbered as obligations are incurred.

In this summary discussion, it is not feasible to outline a comprehensive system of municipal accounts or to describe prevailing practices in all the local governments of the state. For most of the municipalities the standard resource on governmental accounting procedures is the Office of the State Comptroller (OSC).

11.3.5 Financial Reporting

The systematic recording of financial information can be used "(1) as a basis for managing the municipality's affairs, (2) as a control to prevent waste and inefficiency, (3) as a check on the fidelity of persons administering municipal funds, and (4) as a means of informing interested parties of the municipality's financial condition and operations." [1]

The municipal accounting system is the source of both the municipality's fiscal year-end statements and the periodic internal reports that localities find important for management purposes. These periodic reports show whether revenues are coming in and expenditures are going out at the times and in the amounts projected by the budget plan. Monitoring of this information allows management to make appropriate budgetary modifications during the year.

General Municipal Law section 30 requires local governments to file a financial report annually with the OSC. Until 1996 the law required municipalities to file a paper report on forms provided by OSC, but an amendment in that year allowed for electronic filing. Beginning with the reporting for the fiscal year ending in 1996, counties, cities, towns, villages, school districts and joint activities have been able to transmit their reports electronically using the internet or through the Comptroller's Assistance Network (a 24 hour electronic bulletin board). Filing electronically with the free software provided by OSC (or by the State Education Department for school districts), saves time, improves accuracy and reduces paperwork.

11.3.6 Other Financial Functions

Other leading aspects of local government finance administration include the functions of cash management, purchasing and property acquisition, insurance and risk management and post audit.

11.3.6.1 Cash Management

Some local governments carry cash balances in excess of those necessary for transactions. Carrying excess funds costs the income the funds would have earned if invested. In order to anticipate their cash balance needs, local

[1] Municipal Finance Administration, Sixth Edition, International City Managers' Association, Chicago, 1962, p. 205.

government officials can prepare a cash flow analysis to forecast the cash position of the local government over the entire fiscal period. Proper cash management can provide maximum earnings and minimum borrowing for the local government. Local government officials should be aware of investment factors including legality, safety, liquidity and yield. The Office of the State Comptroller provides guidance to local officials regarding cash management and a wide variety of other topics on local government finance.

11.3.6.2 Purchasing and Property Acquisition

Other features of financial management relate to purchasing, contracting and storage, and the problem of how far these responsibilities can or should be brought under centralized procurement policies and procedures. Counties, cities, towns, villages, school districts and fire districts purchase goods, services and real property pursuant to procedures and requirements set forth in applicable law. To reduce their purchasing costs, localities sometimes participate in cooperative purchasing endeavors and utilize assistance available from the state.

The New York State Office of General Services (OGS) offers local governments the opportunity to purchase a wide range of goods at favorable prices under state contracts. In addition, OGS offers various kinds of technical assistance for local government purchasing, and assists localities with the procurement of products made by prisoners and the blind. Through OGS, local governments are assisted in the acquisition of surplus state personal and real property and surplus federal property.

11.3.6.3 Post Audit

Municipalities are subject to audit by various federal and state government agencies. In addition, municipalities may elect on their own to have general or selective audits. A post audit is an audit made after the event, when financial transactions have been recorded and completed. Municipalities' internal auditors often conduct audits of subsidiary agencies within the municipal organization on a continuing basis.

11.3.6.4 Insurance and Risk Management

Decreasing resources and increasing insurance costs are putting greater emphasis on risk management. There is often a variance between the optimal and the maximum feasible amount of insurance coverage. While most localities need to have insurance coverage for catastrophic events, they may take a number of steps to reduce costs. An acceptable safety program, self-insurance, coinsurance, blanket insurance and competitive bids can sometimes reduce costs.

11.3.7 State Supervision of Local Finances

During the 1930s, there was a depression-born trend toward state scrutiny of municipal budgets and expenditure programs, review and approval of proposed municipal borrowings, and measures designed to assist in the marketing and acceptance of local bond issues. Municipal conditions inviting state intervention during these periods included persistent weaknesses in current accounts, the incurrence of large volumes of floating indebtedness, reliance upon borrowing for current expense to shore up sagging municipal budgets, debt readjustments and refunding, and actual or incipient defaults.

From these various factors and developments emerged the main ingredients commonly associated with state supervision of local finances: legal tax and debt limitation; debt regulation through uniform bond laws and their administration; reporting, auditing and accounting requirements; central review of debt proposals and expenditure programs; varying degrees of involvement in debt planning and issuance — all fortified by advisory and technical assistance.

11.3.8 Leading Features of State Supervision

Many of the leading features of state supervision of local finances in the State of New York derive from constitutional and statutory requirements previously discussed in this chapter. Chief responsibility for state supervision of municipal finance resides in the Office of the State Comptroller. Among other services, the OSC's functions include:

- providing ongoing assistance through the OSC Division of Local Government and School of Accountability to enable and encourage local government officials to:
  - continuously improve fiscal health
  - reduce costs and improve the effectiveness of their service delivery, and
  - to account for and protect their government's assets.

This Division also performs periodic audits and reviews of local governments, conducts training for local officials and provides consulting services;

- supervising compliance of local governments with legal tax and debt limitations and requiring submission by local governments of debt statements and annual budgets;
- providing technical assistance, reviewing applications requesting approval of exclusions from the local debt limit exclusions, and the formation or extension of town improvement districts, fire districts and county special districts;
- collecting and disseminating local government financial information including statistics on revenues, expenditures and debt;
- developing uniform accounting systems and providing guidance on financial management practices;
- administering the State and Local Government Employees' Retirement Systems; and
- providing advisory legal opinions to local governments pertaining to the powers and duties of the local government under state laws of general applicability including written advisory opinions on prospective actions of local government.

11.3.9 Annual Financial Report Reviews

A review of each local government's annual financial report is performed by the OSC to assess compliance with minimum established standards. The information from this process becomes an integral part of a Uniform Risk Assessment Process (developed in 1999). Based upon analysis of identified risk areas, assistance to improve local government operations is offered as appropriate.

11.3.10 Deficit Financing Legislation

Occasionally local governments accumulate deficits to a point that the only recourse left is to obtain special state legislation that authorizes the local government to issue debt to finance the deficit. This action enables the local government to pay off a portion of the debt (through annual debt service payments) over a number of years. Such legislation generally requires the OSC to certify to the amount of the deficit before any such indebtedness can be issued. The OSC also reviews and makes recommendations on the proposed budgets of these municipalities during the period such financing is outstanding.

11.3.11 Oversight Boards

In extreme situations the State Legislature has determined that certain local governments needed additional oversight. This action has been prompted by periods of prolonged fiscal difficulty or, in rare instances, because the local government has lost access to financial markets. Oversight boards typically have powers to approve debt issuances, approve budgets and/or financial plans, approve contracts including employee contracts, and, in rare instances, assure the payment of obligations through the intercept of state aid and tax revenues. Legislation creating control boards usually provide for members to represent interested parties such as the Governor, State Comptroller, State Legislature and generally the local government and/or, local business leaders and local representatives. The legislation also establishes criteria to determine when the local government has regained its financial health. Typically, once the local government meets those criteria, the oversight board approval powers cease.

11.3.12 Local Government Data Base

The oversight activities rely heavily on an improved computerized data file known as the Local Government Data Base. This file is created and maintained by the OSC and contains comprehensive financial and other data on all local governments in the state from fiscal year 1977 onward. Much of this data is obtained from annual financial reports filed by each local government. The reports contain financial statement data (i.e., financial position and results of operations and changes in financial position) as well as detailed revenues and expenditures. This data file is regularly transmitted to the Division of the Budget, the Senate Finance Committee and the Assembly Ways and Means Committee to be used as the basis for much of the program analyses and fiscal impact studies regarding state and local relations.

11.3.13 Generally Accepted Accounting Principles (GAAP)

Since the early 1900's the Office of the State Comptroller has prescribed Uniform Systems of Accounts for local governments. The purpose of these systems has been to provide a means of gathering financial data from local governments that is consistent in classification and content. This information is used by financial analysts in the Comptroller's Office, other agencies and the State Legislature.

These systems do not set Generally Accepted Accounting Principles (GAAP). They are promulgated by the Governmental Accounting Standards Board (GASB). GAAP is a technical term used to describe the conventions, rules and procedures that constitute accepted accounting practices on a nationwide basis.

Since the late 1970's the Office of the State Comptroller has determined that adherence to Generally Accepted Accounting Principles is in the best interest of New York State and its local governments. Consequently the Uniform Systems of Accounts prescribed by the Comptroller are periodically updated to reflect changes in GAAP. In addition, the Comptroller's Office issues accounting bulletins and conducts training sessions for local officials.

11.3.14 Governmental Accounting Standards Board (GASB)

The Governmental Accounting Standards Board, which is the standard-setting body for establishing governmental accounting and financial reporting principles, from time to time will issue statements that prescribe accounting and financial reporting requirements for certain transactions. When a new accounting/financial reporting standard is issued by GASB, it must be critiqued by the Office of the State Comptroller to identify the accounting issues involved as well as what information is required in order to comply. As part of the accounting issues determination process, both financial reporting requirements and the affect on the State's financial position must be identified. Input from the units, that may be impacted by the change, in OSC will be solicited. Based upon this information obtained, a decision is made whether to recommend implementation of the statement.

Chapter 12

Financing Local Government

The balancing of municipal programs and activities against available fiscal resources is the key element in financing local government. The task is performed in an environment essentially different from that of a business enterprise in the private sector since laws, constitutions, and public accountability, as well as considerations of public policy, all impose constraints.

Broadly speaking, financing local government is a twofold proposition. It involves a determination, on the expenditure side, of the quantity and quality of activities, services and improvements that will be undertaken by the community; and an allocation of resources from revenues and borrowing within the capacity of the community. Political, economic and social considerations are involved in the process. All enter into the formulation of financial plans, which are most visible in the budget of a municipality, where commitments and resources are brought into balance on an annual basis.

Compared to the private sector, local governmental financial decisions seem largely removed from the classical marketplace. They are constrained within a framework of State Constitution, state statutes, and legal restrictions found in charters, local laws and ordinances. The legal setting of local finances is one of the first things to impress public officials upon taking office. It permeates many aspects of municipal finance administration.

Local governments may spend money only for what are deemed public purposes, a basic condition which springs from the State Constitution and appears in statutes and official opinions of state agencies. Strict conditions are attached to the delegation of the state's taxing power. Many local governments are restricted as to the amounts they may raise by levies upon real property, and they may levy taxes other than property taxes only as authorized by the Legislature. New York State law also closely constrains local governments with respect to incurring indebtedness, including limitations on its purposes, the types of municipal obligations, maximum terms of debt for different purposes and basic conditions of bond sale and guarantees. Financing local government takes place in an arena of competing demands and conflicting interests. The individual local government faces internal and external pressures; the state and federal governments are very much in the picture. Local officials are responsible for striking a balance among these interests and pressures.

12.1 Local Expenditures in New York

Local government expenditures may be divided into current operations, equipment and capital outlays, and debt service costs. Equipment and Capital outlays cover expenditures for equipment purchases and the construction, improvement and acquisition of fixed assets. Debt service costs include the payments of principal and interest on debt. All other local costs fall into the current expense category, which accounts for the largest share of expenditures — 86 percent of local government costs in New York State in 2012.

12.1.1 Expenditure Patterns

Table 12.1 [128] and Table 12.2 [129] summarize 2012 current expenditures by general purpose local governments, excluding the City of New York. It presents a generalized profile, in dollar terms, of the service responsibilities of these local governments.

- Counties are heavily involved in social services programs. The expenditure profile, however, confirms the diversification of county services;
- City and village expenditures show a similarity in the application of resources to public safety;
- Traditional town responsibilities for general government and highway functions are reflected in the table. Towns are also heavily involved in water and sewer services, refuse management and public safety.

12.1.2 Expenditure Factors

Expenditures for social services and health programs mandated and partly financed by the state and federal governments have greatly increased. Population and economic changes pose challenges for local governments throughout the State of New York.

Central cities focus on a wide variety of municipal services including police and fire services, roads, health, transportation, economic assistance, culture and recreation, sanitation, sewer and water service, and upgrading deteriorating infrastructure and facilities. City officials are often looking for ways to conserve their cities' existing residential, commercial and industrial assets, and to attract and hold new enterprises. Towns, on the other hand, are more generally concerned with community development, the extension of necessary municipal services, the installation of public improvements and other typical demands of growth due to out-migration from cities.

Table 12.1: Local Government Current Expenditures by Function, 2012 (Excluding New York City) Amounts in Millions of Dollars.[2]

Function	Counties	Cities	Towns	Villages	Total
General Government	$4,126.6	$615.2	$1,049.3	$400.4	$6,191.5
Education	1,158.4	10.2	4.7	0.1	1,173.4
Public Safety	2,983.2	1,121.9	986.9	523.9	5,615.9
Health	1,810.2	1.2	51.7	1.7	1,864.8
Transportation	1,488.0	369.8	1,391.6	289.2	3,538.6
Social Services	5,699.0	57.1	89.6	24.8	5,870.5
Economic Development	259.9	139.8	49.4	25.1	474.2
Culture and Recreation	262.2	171.3	579.7	141.7	1,154.9
Community Services	254.9	41.5	98.8	24.2	419.4
Utilities	109.1	197.1	363.5	336.7	1,006.4
Sanitation	892.1	243.4	849.7	265.9	2,251.1
Employee Benefits	3,326.8	1,012.0	1,170.7	468.7	5,978.2
Debt Service	1,384.1	324.7	768.9	244.4	2,722.1
Total	$23,754.5	$4,305.2	$7,454.5	$2,746.8	$38,261.0

Table 12.2: Local Government Current Expenditures by Function, 2012 (Excluding New York City) Percent Distribution.[4]

Function	Counties	Cities	Towns	Villages	Total
General Government	17.4	14.3	14.1	14.6	16.2
Education	4.9	0.1	0.1	0	3.1
Public Safety	12.5	26.0	13.2	19.1	14.7
Health	7.6	0.1	0.7	0.1	4.9
Transportation	6.3	8.6	18.7	10.5	9.2
Social Services	24.0	1.3	1.2	0.9	15.4
Economic Development	1.1	3.2	0.7	0.9	1.2
Culture and Recreation	1.1	4.0	7.8	5.2	3.0
Community Services	1.0	1.0	1.2	0.9	1.1
Utilities	0.5	4.6	4.9	12.2	2.6
Sanitation	3.8	5.7	11.4	9.7	5.9
Employee Benefits	14.0	23.5	15.7	17.0	15.6
Debt Service	5.8	7.6	10.3	8.9	7.1
Total	100.0	100.0	100.0	100.0	100.0

Table 12.3 [129] reflects growth in current expenditures from 2007 through 2012 for each respective unit of general and special purpose local government, excluding New York City. During the five-year period 2007 through 2012, local governments experienced a 10 percent increase in current expenditures. Growth of expenditures in school districts outpaced that experienced by other local governments during this period.

Table 12.3: Local Government Current Expenditures, 2007 and 2012 (Amounts in Millions of Dollars)

Government Unit	2007	2012	Percent Increase
Counties (excluding New York City counties)	$21,698.5	$23,754.5	9.5
Cities (excluding New York City)	4,213.7	4,305.2	2.2
Towns	7,411.3	7,454.5	0.6
Villages	2,599.4	2,746.8	5.7
School Districts (excluding New York City)	32,686.5	37,340.3	14.2

[2] Office of the State Comptroller
[4] Office of the State Comptroller

Table 12.3: (continued)

Government Unit	2007	2012	Percent Increase
Fire Districts	665.6	722.9	8.6
Total	$69,275.0	$76,324.2	10.2

12.2 Local Government Revenues

Total local government revenues in New York State increased by about 10 percent during the period 2007 to 2012, from $66.2 billion to $72.6 billion. A significant development in local revenue sources during the sixties and seventies was the growing importance of intergovernmental aid. The federal government, through its array of categorical grant programs, transferred substantial sums to state and local governments.

New York State also increased its aid to local governments, providing more general assistance as well as funds for specific programs.

The introduction of federal general revenue sharing in 1972 signaled the shift from categorical to block grants. Local government was thus provided with more control over the disposition of its federal monies, but with a reduced amount available, beginning in the second half of the seventies. The federal revenue sharing program expired in 1986. The early 1980's witnessed increased efforts to consolidate numerous categorical grant programs in such areas as education, social services and health into a greatly reduced number of block grants and has not changed dramatically since. The federal contribution to local revenues in New York State in 2012 was $5.1 billion, 29 percent more than the 2007 level of $4.0 billion. State aid of $ 16.1 billion in 2012 was 4 percent more than the 2007 amount of $15.6 billion, with increases in school aid a significant factor in state aid growth over the period.

Local government property tax in New York State rose from 59.5 percent of all local revenue in 2007 to 62.1 percent in 2012. Property taxes in 2012 totaled close to $32.1 billion, about 15 percent more than 5 years earlier.

Table 12.4 [131] shows total tax revenue for New York State and its local governments by type of tax. The real property tax raises significantly more revenue in the state than any other single tax.

12.3 Property Taxation

The property tax in New York State is a tax based on the value of real property (land and improvements). It occupies a special place in the financing of local government not only because of its yield in relation to total local revenue, but also because of its key position in the municipal budget process.

12.3.1 Property Tax and Local Budgets

Municipal budgeting follows a procedure which first estimates expenditures or appropriations and then deducts estimated revenues from sources other than the property tax to arrive at a remainder, which is the tax levy. Thus the property tax levy becomes the balancing item on the revenue side of the municipal budget. This process is constrained by the existence of legal limitations upon the amounts which may be raised by certain jurisdictions from the real property tax.

Table 12.4: Local Taxes in New York State, 2007 and 2012 (Amounts in Billions of Dollars).[6]

Local Taxes	2007 Amount	2012 Amount
Real Property	$27.8	$32.1
Sales	8.6	9.1
Other Taxes and Fees[7]	0.3	0.3
Total	$36.7	$41.5

The final step is fixing the local tax rate. The tax levy is divided by the total dollar amount of the taxable assessed valuation of real estate within the local government. The result is a percentage figure, which is expressed as a tax rate, normally so many dollars and cents per $1,000 of assessed valuation.

Where the tax levy for a county, school district or improvement district is spread between or among two or more municipalities, assessed valuations are equalized for each municipality through the use of equalization rates. Equalization is intended to ensure equity where a property tax is levied over several local government units that assess properties at different percentages of value.

For school apportionment and for county apportionment in most counties, the equalization rates are determined by the State Office of Real Property Tax Services (ORPTS). In other counties — except Nassau County and the counties in New York City — equalization rates are established by the county legislative body, subject to review by ORPTS.

12.3.2 Property Tax and Local Revenues

Table 12.5 [131] illustrates the position which real property taxes occupied in the general revenue structure of local governments and school and fire districts in 2012. Property taxes continue to play a prominent role in financing school district, town and village expenditures. Fire districts also depend heavily upon this revenue source.

Table 12.5: 2012 Local Government Revenue Sources Percent Distribution

Government Unit	Real Property Taxes and Assessments	Non-property Taxes	State Aid	Federal Aid	All Others	Total
Counties (excluding New York City counties)	23.2	32.2	11.8	11.6	21.2	100.0
Cities (excluding New York City)	26.5	20.8	18.8	5.9	28.0	100.0

[6] Office of the State Comptroller, Detail may not add due to rounding.

[7] Includes sales tax credits to towns used to reduce real property tax levy, utility gross receipts tax, consumer utility tax (if not included in sales tax), OTB surtax, hotel occupancy tax, harness and flat track admission tax, privilege tax on coin-operated devices, revenues from franchises, interest and penalties on non-property taxes, etc.

Table 12.5: (continued)

Government Unit	Real Property Taxes and Assess-ments	Non-property Taxes	State Aid	Federal Aid	All Others	Total
Towns	53.3	11.3	6.7	4.8	23.9	100.0
Villages	48.9	7.1	4.4	3.5	36.1	100.0
School Districts (excluding New York City)	55.9	0.7	33.9	5.1	4.4	100.0
Fire Districts	94.0	0	0.1	0.5	5.4	100.0
Total — All Units	43.9	12.9	22.2	7.0	14.0	100.0

Table 12.6 [132] shows the increase in real property tax income between 2007 and 2012 for all levels of local government. Overall, real property taxes in 2005 were about 34 percent higher than in 2000.

Table 12.6: Local Government Real Property Tax Revenue by Type of Government, 2007 and 2012 (Amounts in Millions of Dollars).[9]

Government Unit	2007	2012	Percent Increase
Counties	$4,648.6	$5,254.6	13.0
Cities	1,014.7	1,131.7	11.5
Towns	3,231.9	3,711.4	14.8
Villages	1,087.0	1,285.0	18.2
School Districts (excluding New York City)	17,238.4	20,086.7	16.5
Fire Districts	582.1	676.6	16.2
Total	$27,802.7	$32,146.0	15.6

12.3.3 Property Tax Exemptions

The exemption of federal property from local taxation springs from the American constitutional doctrine of intergovernmental immunity. The exemption of state property from local taxation rests on the principle that the sovereign entity cannot be taxed by subordinate political units and still be sovereign. When so determined by the Legislature, however, the state does permit taxation of its property.

The exemption of certain privately-owned property from local taxation is grounded in theory, history and practice. The underlying principle is that real property used exclusively for religious, educational or charitable purposes

[9] Office of the State Comptroller

serves a public purpose by contributing to moral improvement, public welfare and the protection of public health. Although such property is wholly exempt from general municipal and school district taxes, it does pay a share of the costs of certain capital improvements made by improvement districts (such as water supply and sewer systems).

Exemptions from property taxation may be granted in the State of New York only by general law. References to the subject comprise some of the most extensive and complex provisions of the Real Property Tax Law. State law in some instances mandates exemption and in other instances allows exemption upon enactment of local legislation.

12.3.3.1 Non-fiscal Purposes

The use of the property tax for what may be described as non-fiscal purposes — to accomplish goals other than raising municipal revenue — is a controversial topic, particularly as such uses extend beyond the traditional confines of religious, educational, or charitable purposes and are directed toward economic, environmental and social ends. The following are examples of types of property which may be partially or fully tax-exempt: public housing, privately owned multiple dwellings, industrial development agency facilities, commercial and industrial facilities, railroads, air pollution control facilities, industrial waste treatment facilities, agricultural and forest lands, and the residences of veterans and low-income senior citizens.

Property tax exemptions may cause financial stresses on local governments. Exemptions do not reduce tax levies, but instead shift a greater portion of the levy to remaining taxpayers, who consequently must pay higher taxes. An exception is the School Tax Relief (STAR) exemption, a partial school tax exemption applicable to most residential property, which is State-funded. Many challenge the use of property tax exemptions for non-fiscal purposes, arguing that subsidies for such purposes might better come from broader revenue sources than the limited base of the local property tax.

The standard source at the state level for technical assistance on the law and practice of property tax exemption is the State Board of Real Property Tax Services. The Board has published a number of reports on the impact of various exemptions on local tax bases. In addition, it annually publishes a statistical report detailing the value and location of exempt property in the state.

The value of exempt property is often obscure. Many assessors conclude that they have no reason to place realistic values on property which will not be taxed. Furthermore, many assessors do not revise exempt property lists, even periodically, since the figures are not utilized for any apparent purpose. However, where a tax levy is spread between or among two or more municipalities, the equalized value of tax exempt properties is used when calculating the tax rates, so unrealistic values on tax exempt properties can affect a tax levy. Consequently, the reported valuations of exempt properties in New York State in all likelihood do not reflect their full impact on municipal tax bases or the revenue they would return if they were made taxable. With that caveat in mind, it is worth noting that the ratio of exempt valuation to the total of taxable and exempt valuation in New York State rose from 11 percent at the turn of the twentieth century to about 32 percent in 2005.

12.3.3.2 Exemptions in Cities and Towns

In 2005 there were 4.5 million property tax exemptions on assessment rolls in New York. The value of exempt property in cities and towns totaled $678 billion in 2005, almost 32 percent of the state's real property assessed value. In nine of New York's cities, more than half of the value of the real property contained therein was exempt from taxation. Twenty-three of the 932 towns in New York had in excess of 50 percent of their total real property value exempt from taxation on their 2005 assessment rolls.

Property owned by government and quasi-government entities, such as public authorities, accounts for 47 percent of the total value of exempt property. As for private owners, the largest proportion of exempt property is owned by

community service organizations, social organizations and professional societies (13 percent of all exempt property). As for exempt residential property other than multiple dwellings, the leading categories of exemption based on value are the School Tax Relief (STAR) Program (23 percent of total exempt value), property owned by veterans (almost 5 percent) and property owned by senior citizens (about 2.5 percent).

The percentage of exempt value attributable to state-mandated exemptions statewide was 94 percent. In absolute terms, the total value of state-mandated exemptions on 2005 assessment rolls was $637 billion.

12.3.4 Property Tax Administration

The administration of the real property tax involves four tasks:

1. the discovery and identification of land and buildings;
2. their valuation by a defensible method or suitable combination of methods;
3. the preparation of the final assessment roll against which property taxes are levied; and
4. the review of assessed valuations for the correction of inequalities.

12.3.4.1 Organization for Assessment

The first three of the above tasks are the duty of local assessors. In New York State the assessing units include the 62 cities and 932 towns. Other local governments use the assessment rolls as they require them. County and school tax levies, it was noted earlier, are distributed among constituent municipalities in relation to their equalized values. Although the 550 villages are empowered to assess property for purposes of village taxation, many accept the town rolls and a majority have terminated their status as assessing units and transferred that function to the towns.

There are two county assessing units in the state: Tompkins County and Nassau County. Under the Tompkins County Charter, an appointed county director of assessment assesses all real property in the county subject to taxation for county, town, village, school district or improvement district purposes. The Nassau County Government Law establishes a county board of assessors, consisting of four appointed members and a chairman and executive officer who is elected from the county at large. The board assesses real property on a countywide basis for purposes of county, town, school district and improvement district taxation.

Local assessors are either elected or appointed to their positions. All but two cities have a single appointed assessor or appointed boards of assessors. Since 1927 village assessors have been appointed, and villages have either one or three assessors. In some villages, the village trustees act as assessors.

Title 2 of Article 3 of the Real Property Tax Law provides that, except in Tompkins and Nassau Counties, cities under 100,000 population and all towns shall have a single assessor, appointed to a six-year term of office. In any city or town where one or more of the offices of assessors was elective, the governing body was empowered to retain elective assessors by enactment of a local law, providing such action was taken prior to April 30, 1971. About 50 percent of towns retained elected assessors under this option.

12.3.4.2 Property Valuation

There are three basic methods for arriving at the value of real estate for tax assessment purposes - sales analysis and comparison, income capitalization, and the replacement cost of improvements. The separate valuation of land entails a further set of value factors and a judgment as to their combined effect upon a give parcel of land.

Among the various considerations are prevailing land use or classification, sales and income data, and the establishment of separate units of value (such as front foot), subject to modification for reasons of lot size, depth or irregularities.

The basic issues in property valuation are treating the owners of taxable property fairly and administering the property tax efficiently in the interest of both the municipality and the taxpayers. Until December, 1981, Section 306 of the Real Property Tax Law required all assessments to be set at full value. Historically, however, real property in this state was usually assessed at a percentage of full value. Inequities had long existed among and within different classes of property, e.g., residential, industrial, commercial. These inequities stimulated a series of court challenges to the property tax assessment system in New York State. The most notable cases are Hellerstein v. Assessor of the Town of Islip 37 NY2d 1,371 NYS2d 388 (1975) modified by 39 NY2d 920,386 NYS2d 406 (1976) and Guth v. Gingold (34 NY2d 440,358 NYS2d 367 (1974)).

In its June 1975 decision in Hellerstein, the Court of Appeals found that assessment of real property must be at its full value since the Real Property Tax Law did not, at that time, authorize fractional assessments. In Guth, the Court of Appeals determined that a property owner could use the equalization rate established by the State Board of Equalization and Assessment (now the State Board of Real Property Tax Services) as a sole means of proving inequality with respect to the assessment of a property.

In December 1981, the State Legislature repealed Section 306 of the Real Property Tax Law thereby removing the full value assessment requirement. Section 305 of the Real Property Tax Law authorizes the continuation of existing methods of assessment in each assessing unit. However, it specifically requires assessment at a uniform percentage of value (fractional assessment) within each assessing unit.

Special provisions applicable to New York City and Nassau County prescribe a classification system. In all other areas of the state, assessing units are authorized to preserve homestead class tax shares on taxing jurisdictions completely within the assessing unit - predominantly cities, towns or villages. This means they may reduce the tax burden on residential real property (dwellings for three or fewer families) and farmhouses relative to other types of property.

12.3.4.3 Assessment Improvement

Efforts at the local level to improve assessment administration take various forms such as assessor training, improved record-keeping, tax maps and computerization of assessment data. Many municipalities have conducted comprehensive reappraisals. State financial assistance on a per parcel basis is available to assessing units which conduct reappraisals. Statewide, however, wide disparities still exist among classes of property and within classes of property regarding a uniform and equitable relationship of property assessments to full value.

The State Board of Real Property Tax Services maintains a comprehensive system of software programs called the Real Property System (RPS) which is available, for free, to all assessing units. It is capable of maintaining assessment, physical property inventory, and valuation information for any type of real property. In addition, RPS has the ability to conduct a mass appraisal of an entire municipality and is capable of producing assessment rolls, tax rolls and tax bills. In addition, it includes a Geographic Information System (GIS) and ten layers of State-provided geographic coverage data (roads, municipal boundaries, wetlands, school district boundaries, etc.). A document image management system (DIM) allows any document, such as a photograph, a sketch, a deed or a map, to be electronically attached to a parcel of property. A custom report writer (CRW) provides the assessor with the ability to create reports regarding assessment, sale or inventory data. Other municipal systems or off-the-shelf software can be easily integrated with the RPS system. The Office of Real Property Tax Services (ORPTS) periodically develops updates to the RPS system.

Legislation passed in 1970 provided for the appointment of property tax directors at the county level to coordinate and assist local assessment functions; gave towns the option of converting from elected to appointed assessors; created boards of assessment review in each municipality; required all counties with the exception of Westchester

and those in New York City to provide assessors with modern, accurate tax maps; established minimum qualifications for appointed assessors; and required many town and most city assessors to achieve certification from the State Board of Real Property Tax Services. The legislation also provided for advisory appraisals of taxable utility property by the State Board upon local request.

In 1977, the State Legislature enacted Article 15-B of the Real Property Tax Law. This article provides for state financial assistance to local governments which implement improved systems for real property tax administration. This program has been revised several times, including to encourage cyclical reassessments. The "Aid for Cyclical Reassessments" replaces the previous Aid programs. Assessing units that commit to conducting reappraisals of all property at least once every four years may receive up to $5 per parcel in the year of a full reappraisal with additional payments of up to $2 per parcel in interim years.

Effective in 1982, the legislature amended the Real Property Tax Law to make training mandatory for all assessors, whether elected or appointed, as well as for directors of county real property tax services. In addition, the State Board of Real Property Tax Services was given authority to review the qualifications of appointed assessors and county directors to determine if they meet the minimum qualification standards.

12.4 Local Non-Property Taxes

The power of taxation is an inherent attribute of state sovereignty, not possessed by its political subdivisions. Article XVI of the State Constitution declares:

> "The power of taxation shall never be surrendered, suspended or contracted away, except as to securities issued for public purposes pursuant to law. Any laws which delegate the taxing power shall specify the types of taxes which may be imposed thereunder and provide for their review."

Using this authority, the State Legislature has authorized the imposition of what have come to be known as local non-property taxes.

12.4.1 New York City Taxes

New York State began to utilize local non-property taxes because of the difficulties the City of New York experienced during the Great Depression in the 1930s. Delegation of local taxing power on a significant scale started with New York City. At the emergency session of 1933, the Legislature granted the City power to impose, for a six-month period, any type of tax which the State itself could impose. This initial grant of power was to expire six months after its effective date. Amid much controversy the initial grant was renewed and modified, but the broad outlines of state policy with regard to special local taxes did not emerge until 1939. After the 1938 Constitutional Convention, the State altered its home-rule stance toward New York City's authority to tax. From this point forward the Legislature narrowed the range of special taxes available to New York City and began to limit maximum rates. By the postwar period, New York City possessed the power to impose a variety of special taxes, which, under economic conditions in some degree peculiar to the City, became an important source of revenue. These included taxes on hotel room occupancy, sales, utilities, gross income, business gross receipts and pari-mutuel wagering.

12.4.2 Local Utility Taxes

In 1937, the Legislature extended optional, local taxing power to the upstate cities when it authorized upstate cities to levy a local one percent tax on the gross income of public utilities. Initially, the proceeds could only go to pay for relief. In 1942, the Legislature removed the welfare restriction upon the use of utility tax proceeds and receipts could thereafter be applied to general municipal purposes. The utilities gross income tax proved attractive, and cities throughout the state adopted it.

12.4.3 Housing Subsidy Taxes

Following a 1938 housing amendment to the State Constitution, the Legislature authorized a series of special non-property taxes, which could be levied by cities and by villages with a population of 5,000 or more. The proceeds were to cover periodic housing subsidies or to meet service charges for local housing debt incurred outside the normal constitutional debt limit. Although the only two municipalities that took advantage of this legislation — the Cities of Buffalo and New York — have since repealed their local statutes, the enabling legislation marked another phase in the development of local taxing power.

12.4.4 Extension of Permissive Taxing Power

The further extension of permissive local taxing power occurred in New York State at the same time it was expanding elsewhere. After the Second World War, municipal costs soared. Many people felt that the full weight of these additional expenditures should not fall upon the property tax base. Local government officials and finance officers throughout the country expressed interest in gaining authority to adopt non-property taxes at local option. One conspicuous result was the well-known "home rule" tax law adopted by the Commonwealth of Pennsylvania in 1947. In 1947 and 1948 the New York State Legislature also enacted permissive local tax laws, applicable to cities and counties. A principal factor stimulating their enactment had been the adoption of a permanent teachers' salary law. These permissive tax laws reflected state policy that optional local taxes had to be defined and that they would neither supplant nor supplement the principal existing sources of state revenue.

The most productive local tax contained in the law was the sales tax. Other items included a business gross receipts tax (later denied upstate), a tax on consumers' utility bills, and an array of miscellaneous taxes or excises. The permissive tax law has been frequently amended and additional local taxes or options have been made available under other provisions of law.

12.4.5 Adoption of Permissive Taxes

Among the important developments with respect to optional local taxing powers are the following:

- All 57 counties (outside of New York City) have adopted a sales and use tax. As of September 2005, 49 of these counties plus New York City have local sales tax rates that exceed the 3 percent statutory limit, including eight counties with local rates exceeding 4 percent.
- Extension of limited optional local taxing power to city school districts, with the result that by 2005, 21 city school districts had adopted a consumers utility tax.
- 60 cities, other than New York City, and 348 villages, have accepted at least a one percent tax on the gross income of utility companies.
- Ten of the 61 eligible cities, other than New York City, have adopted the miscellaneous taxes and excises allowed by law, including taxes on coin-operated amusement devices, hotel room occupancy, real estate transfers, restaurant meals, amusement admissions and the consumer utility tax.

Special local taxes now occupy a prominent place in the financing of local government in the State of New York. Table 12.5 [131] shows the proportion of total revenue provided by local non-property taxes in 2012. Non-property taxes were approximately one-quarter of total revenues for counties and cities other than New York City. Special local taxes were a less significant income-producer proportionately for towns, villages, and school districts in New York State.

The local non-property tax revenues of cities, other than New York City, towns, and school districts outside New York City reflect, in varying degrees, the distribution of county sales tax receipts. More jurisdictions have adopted higher sales tax rates in recent years. The 2007 to 2012 comparison in Table 12.7 [138] shows that jurisdictions are gaining larger sales tax yields. The methods of distribution specified in the Tax Law are varied and complex, and further variations are permissible with the approval of the State Comptroller. Methods employed to distribute county sales tax revenues are the responsibility of county governing bodies.

12.5 Special Charges, Fees and Earnings

Local governments in the State of New York derive substantial revenues from special charges, fees and the earnings of municipal enterprises. In cities, for example, fees and charges may be made for licenses, permits, rentals, departmental fees and charges, sales, recoveries, fines, forfeits and other items. Earnings of municipal enterprises and special activities include user payments and miscellaneous revenues of such operations as water service, bus transportation, airports, hospitals, stadiums and public auditoriums, off-street parking, and municipally-owned public utilities. In the aggregate, local government revenues from special charges, fees and municipal enterprises rose from $5.1 billion in 2000 to $6.7 billion in 2005, an increase of 32 percent.

Table 12.7: Local Non-property Tax Revenue, 2007 and 2012 (Amounts in Millions of Dollars) SOURCE: Office of the State Comptroller

Government Unit	2007	2012	Percent Increase
Counties (excluding New York City counties)	6,879.3	7,299.4	6.1
Cities (excluding New York City)	831.3	890.0	7.1
Towns	710.7	784.8	10.4
Villages	175.2	186.3	6.3
School Districts (excluding New York City)	278.3	269.2	-3.3
Fire Districts	0	0	0
Total	$8,874.8	$9,429.7	6.3

12.5.1 Municipal Practices

Local governments have some latitude in establishing user charges and fixing rates, although fees collected by local officials are often controlled by state law, particularly in the administration of justice and offices of record. In general, the amount of a regulatory license or permit fee must be reasonably related to the cost to the municipality of the particular regulatory program, and the fees established for the use of a municipal service or facility must be reasonably related to the cost of providing the service or operating the facility. Municipalities have found it profitable to reexamine their charges periodically and bring them in line with current costs. Policy issues, local choice, and practical considerations are involved in the imposition of user fees. For example, many local governments will cover, or more than cover, the costs of a water supply and distribution system through water rates. In the case of certain enterprises such as airports, hospitals, public auditoriums, bus transportation and rapid transit, however, considerations other than the recovery of full annual costs may prevail.

At this time, there is no general authority for the imposition of service charges for established responsibilities of local governments such as police, fire, public works and libraries. There are exceptions as to particular aspects of these services, but, in general, these services are viewed as providing benefits to the public at large without relation to particular benefits provided to individuals.

12.6 State Aid

Intergovernmental payments by the state to local governments are a major aspect of local finances. State aid consists of grants-in-aid, which are payments to local governments for specified purposes, and general assistance. State assistance during 2012 accounted for slightly under one-quarter of all revenues received by municipalities and school districts. Overall state aid, in actual dollars, increased 4.2 percent from 2007 to 2012.

12.6.1 Background of State Aid

12.6.1.1 Early Origins

Origins of state aid in New York go back to the early days of statehood. References to state aid for common schools appear in 1795, and education aid began to assume real importance with the free public school movement of the 1840's, although the principle of free schools was not fully realized until after the Civil War. A leading purpose of school aid in this era was to compensate for revenue losses which resulted from eliminating local tuition. At a later point, the state introduced incentive grants to stimulate local participation in particular aspects of public education. These purposes - providing assistance in meeting the costs of state-originated programs and providing an incentive for localities to participate in such programs - have continued to this day.

12.6.1.2 Growth and Expansion

State aid has grown from its small beginnings to its present dimensions because of various economic and social developments. These include free schools; the coming of the automobile; statewide initiatives in health and mental health, sanitation and public welfare; and, more recently, concern with the environment and natural resources, educational opportunity beyond twelfth grade, public safety and mass transportation.

12.6.2 Amount of State Aid

Table 12.5 [131] illustrates the position which state aid occupies in the general revenue structure of local governments in the state in 2012. Overall, state aid supplied 22.2 percent of all local government revenues in 2012. State aid is a very important revenue source for school districts outside New York City, representing 33.9 percent of their revenues in 2012.

Table 12.8 [139] illustrates the percentage increase in state aid between 2007 and 2012 for the different classes of government in the State.

Table 12.8: State Aid Payments to Local Governments by Type of Government, 2007 and 2012 (Amounts in Millions of Dollars).[11]

Government Unit	2007	2012	Percent Increase
Counties (excluding New York City counties)	$2,828.5	$2,678.5	-5.3%

Table 12.8: (continued)

Government Unit	2007	2012	Percent Increase
Cities (excluding New York City)	827.0	801.6	-3.1
Towns	640.2	468.8	-26.8
Villages	154.3	114.6	-25.7
School Districts (excluding New York City)	11,126.1	12,167.1	9.4
Fire Districts	1.8	0.6	-66.7
Total	$15,577.9	$16,231.2	4.2%

12.6.3 State Aid to Local Governments

12.6.3.1 General Purpose Assistance

General purpose assistance can be defined as financial aid for the support of local government functions without limitation as to the use of such aid and without the substantive program and procedural conditions that are routinely attached to categorical grants-in-aid. In the late 1990's, interest centered on the General Purpose Local Government Assistance program, which distributed over $770 million to cities, towns and villages during state fiscal year 1999-2000. The program, which had been titled "Revenue Sharing" in the early 1970's, grew to include four distinct components: General Purpose Local Government Aid (GPLGA); Emergency Financial Aid to Certain Cities; Emergency Financial Aid to Eligible Municipalities, and Supplemental Municipal Aid. The 2005-06 budget established the Aid and Incentives for Municipalities (AIM) Program, which collapsed these four programs into one "base level grant" for all cities, towns and villages statewide.

New York State has provided financial aid to its municipalities since 1789. Early programs included categorical grants for activities encouraged by the state and the shared tax system whereby localities received portions of taxes they had participated in collecting. The per capita aid program instituted in 1946 allocated specific dollar amounts per capita to cities, towns and villages. In 1965, a statutory formula was established to calculate aid based on fiscal need, effort and capacity indicators.

The revenue sharing program created in 1970 was designed to eliminate the complexity and uncertainty of previous state aid programs and to provide municipalities with flexible, equitable and predictable aid. New York State Finance Law Article 4-A, section 54 outlines the framework of the Revenue Sharing Program, which is based on the previous Per Capita Aid Program. This program was designed to allocate specific amounts to counties, cities, towns and villages (with special emphasis on cities), based on population and full value data. The original legislation envisioned a distribution of aid equaling 21 percent of Personal Income Tax (PIT) revenues and that such aid would grow annually keeping pace with growth in the State's major revenue source.

The revenue sharing program underwent numerous changes in the 1970s. Before the program was even implemented, allocations were cut in 1971 to 18 percent of PIT receipts. In 1977-78, the State capped distributions at the 1976-77 level. In 1978-79, revenue sharing aid was further restricted when statute was amended to change the basis of funding from 18 percent of PIT receipts to 8 percent of total State tax collections. In 1979-80, the State froze revenue sharing at the 1978-79 level, and until 1984-85, funding was capped at $800 million.

[11] Office of the State Comptroller

The program peaked in fiscal year 1988-89 at nearly $1.1 billion. During the early 1990's, New York reduced numerous programs, including unrestricted local government aid by roughly 50 percent over four years. By 1992-93, revenue sharing had been decreased by more than $500 million to a low of $532 million.

12.6.4 AIM Program

The Aid and Incentives for Municipalities (AIM) program enacted in 2005 – 2006, increased unrestricted aid to cities, towns and villages by $57 million. The 2007-2008 enacted Budget restructured the AIM program to target additional State aid primarily to fiscally distressed municipalities. An AIM increase of $450 million was authorized in 2007-2008, and in each of the three following years, for a four-year total of $200 million. These increases were tied to enhanced accountability requirements that encouraged local fiscal improvement. The 2007-2008 AIM program included $15 million in grants for a range of local shared services activities. In addition, a new $10 million consolidation incentive aid is created under SMSI provides a recurring 25 percent AIM increase to municipalities that merged or consolidated in 2007-2008.

12.7 Federal Aid

The role of federal aid in local finances from 2007 through 2012 is indicated in Table 12.9 [142]. During this period federal assistance to local governments in the state increased from $4.0 billion in 2007 to over $5.1 billion in 2012.

Under pressure from state and local governments, which were overwhelmed by the multiplicity of federal programs and their individual requirements and administration, Congress enacted legislation during the 1970s that consolidated various categorical aid programs into block grants in the broad functional areas of education, manpower, law enforcement, and housing and community development. These programs have been broadly characterized as "special revenue sharing" programs. Among the objectives of this legislation were the simplification of grant administration, the provision of increased discretion in the use of funds allocated to state and local government grant recipients, and the elimination of conventional matching requirements. This system of categorical block grants to local governments is still presently utilized.

A major development in federal aid was the passage of federal general revenue sharing in 1972. For the first time, the national government distributed aid to local and state governments with very few restrictions on how the money could be spent and without requiring governments to apply for the grants. A local government's allocation was based on a complex formula which, at the local level, took into account the adjusted taxes, per capita income, population and intergovernmental transfers of each governmental unit.

State and local governments received their first revenue sharing checks in December 1972 for the entitlement period January 1 through June 30, 1972. The federal general revenue sharing program was discontinued in the mid 1980's.

12.7.1 Amount of Federal Aid

Table 12.5 [131] illustrates the position which federal aid occupies in the general revenue structure of the local governments in the state in 2012. Overall, federal aid supplied 7.0 percent of all local government revenues in 2012.

Table 12.9 [142] reflects the growth of federal aid from 2007 through 2012 for each respective class of government, both in actual dollars and by percent increase.

Table 12.9: Federal Aid Payments to Local Governments, 2007 and 2012 by Type of Unit (Amounts in Millions of Dollars).[13]

Government Unit	2007	2012	Percent Increase
Counties (excluding New York City counties)	$1,988.5	$2,630.5	32.3
Cities (excluding New York City)	262.0	252.2	-3.7
Towns	212.6	337.4	58.7
Villages	85.6	91.2	6.5
School Districts (excluding New York City)	1,401.6	1,815.0	29.5
Fire Districts	3.2	3.2	0
Total	$3.953.5	$5,129.5	29.7

[13] Office of the State Comptroller

Chapter 13

Personnel Administration

Personnel administration in New York local governments is subject in many important respects to the State Civil Service Law. In general, the law makes several options available to local governments for civil service administration. Although the specific responsibilities of a municipal personnel agency may vary, a sound personnel program rests on clearly drawn local laws, rules and regulations which encompass such matters as recruitment, selection, and placement, performance appraisal; position classification and pay plans, fringe benefits, working conditions, separation, training and career development.

Personnel administration encompasses all of the activities concerned with the human resources of an organization and includes a series of functions which relate to its overall operation. These functions include position classification'` determination of salary scales, fringe benefits, recruitment and selection of employees, performance appraisal, training, establishment of policies and procedures for conduct and discipline, and the development of programs related to health, safety, affirmative action and retirement programs.

Numerous factors - economic and social resources, technological advances, intermunicipal relations, politics and political leadership, special interest groups such as employee unions, and concern for career services — greatly influence personnel programs.

13.1 Historical Development

To understand the goals and purposes of public personnel administration, it is helpful to trace its historic development and, in particular, to note the major role that New York State played in the civil service reform movement. Initially, the philosophy and practices of patronage almost universally governed personnel administration in the United States. Patronage involved giving government jobs to supporters of those who won elections and resulted in the famed and controversial spoils system. Jobs were filled with party workers and with friends and relatives of elected officials. During the nineteenth century the patronage system and its abuses produced increasing alarm. It was charged with lowering morale, encouraging disloyalty and dishonesty, obstructing reward for good work, and discouraging competent people from entering government service.

It is no coincidence that New York generated much of the early impetus for civil service reform, since the spoils system had become most pervasive in the Empire State." As one observer noted, “It was the politicians of New York who gave it its organized impulse. It was in response to Henry Clay’s taunt at the New York system that a New York senator made the famous defense that to the victor belong the spoils of his enemy.” [1] It is not surprising that civil service reformers were most active in New York State, where the problems were most acute. Organized in 1877, the New York Civil Service Reform Association stimulated the rapid development of similar associations

[1] Jerome Lefkowitz, The Legal Basis of Employee Relations of New York State Employees (Association of Labor Mediation Agencies, 1973), p. 2.

in other states. This reform movement led to the enactment of the federal Pendleton Act in January 1883. This law required establishment of a bipartisan civil service commission to conduct competitive examinations and to assure the appointment and promotion of government employees based on merit. Later that year, New York State enacted its first civil service law.

13.2 New York State Civil Service Law

New York State has the oldest civil service system of any state in the nation. Beginning in 1883, as a reaction to the spoils system, it concentrated on the development of examinations and other recruitment devices. The state subsequently adopted a special classification system in order to determining titles and salaries. As state government assumed greater responsibilities and as the state's work force grew, the civil service system was modified and refined by legislation and administrative action. It became a highly complex and sophisticated system, which is now administered by the State Department of Civil Service. Within the department, separate divisions concentrate on specific personnel functions, such as classification, examination and placement. New York State's Civil Service Law also includes provisions for the administration of civil service at the local government level.

13.2.1 Forms of Local Civil Service Administration

The Civil Service Law specifies optional forms of civil service administration for the purpose of administering the law in the counties (including political subdivisions within counties), in the cities and in suburban towns with a population of more than 50,000. Villages have no authority to administer a separate civil service system, but must comply with state law and with locally adopted civil service rules and the regulations of the regional or county civil service commission or personnel officer.

Municipalities can select one of two major options for direct administration of civil service law - the civil service commission or the personnel officer. The commission consists of three persons with no more than two from the same political party. They are appointed either by the governing body or by the chief executive officer of the municipality. Their six-year terms of office are staggered, with one term expiring every two years.

Like the Civil Service Commission, the personnel officer is appointed by the governing body or chief executive for six years and the responsibilities of the office include those of the municipal civil service commission. In addition, the personnel officer often has non-civil service responsibilities of personnel management and human resources administration, such as labor relations, affirmative action and staff development activities. Other governments have developed a hybrid form of civil service/personnel administration. Typically, this joint system of administration consists of a part-time civil service commission and a personnel director. The civil service commission administers the Civil Service Law and promulgates local civil service rules and regulations, while the personnel director carries out the non-civil service functions.

In the event that a county or city chooses to not directly administer a separate civil service system, it may join with one or more other counties or cities, in the same or adjoining counties, to establish a regional civil service commission or a regional personnel officer position. This regional alternative for civil service administration may be established by written agreement approved by the governing bodies of each participating county and city. There are no regional operations in New York State at present.

Political subdivisions with populations of less than 5,000 fall into a special category. The State Civil Service Commission has standards for determining whether or not it is practical in such subdivisions to have civil service examinations for their employees.

13.2.2 Categories of Positions

Sections 35 and 40 of the Civil Service Law establish two major groups of municipal employee positions - the classified and unclassified services.

Positions in the unclassified service are defined by statute and include all elected officials, all officers and employees with duties and responsibilities directly related to either the legislative or elective functions, chief administrators (i.e., department heads) of government, and those individuals with instructional responsibilities within school districts, boards of cooperative educational services, county vocational education and extension boards, or the state university system.

Within the classified service there are four jurisdictional classifications of positions: competitive, exempt, noncompetitive and labor. All positions which are outside the competitive class must be specifically named by the civil service commission and approved by the State Civil Service Commission.

The basis for determining whether a position shall be in the competitive class is the practicality of ascertaining merit and fitness by competitive examination. This process may utilize any, or a combination, of several different tests: written, oral, performance, physical, and review of training and experience. If a position in the classified service is ruled to be outside the competitive class, it is placed in one of the other three classes in accordance with criteria found in the Civil Service Law.

Exempt class positions are designated primarily for positions of a policymaking or confidential nature for which a competitive or noncompetitive examination is impractical. The appointing authority selects employees in this class without regard to civil service rules and regulations governing eligible lists. The intention is that executive and judicial officers should have some latitude and flexibility in selecting, retaining and discharging their closest associates. Another important aspect of exempt positions is that there are no specified minimum qualifications as there are in competitive, non-competitive and labor class positions.

Noncompetitive class positions are positions for which there are established qualifications with respect to education and experience, but it is not practical to determine merit and fitness of applicants by competitive examination. The appointing authority can make appointments without regard to relative standing on eligible lists. There are no noncompetitive eligible lists The labor class includes all unskilled laborers, except those for which a competitive examination can be given. The local civil service commission or personnel officer may require applicants to take examinations for labor class positions if it is practical.

13.3 Local Civil Service Administration

13.3.1 Scope and Responsibility

The municipal civil service commission or personnel officer administers the Civil Service Law for classified municipal employees. Rules adopted by the commission or personnel officer are subject to approval by the State Civil Service Commission. The local commission or personnel officer must maintain extensive employee records for certifying payrolls, conducting examinations required by law and preparing appropriate lists of people eligible for appointment.

Regardless of the form chosen, the civil service commission or personnel officer of a county administers the Civil Service Law for the county and the political subdivisions within the county, including towns, villages and school districts, except for suburban towns with a population of 50, 000 or more and cities that choose to operate independently. In the case of a city or suburban town that opts to have its own civil service commission or personnel officer, the administration covers all officers and employees of the town or city, including the city school district. The jurisdiction of a regional commission or personnel officer includes all municipal employees within the region, who would otherwise be subject to the jurisdiction of the local civil service administration of the respective counties and cities within the region.

13.3.2 Changing the Form

The Civil Service law also makes provision for changing the system of administering civil service law in counties, cities and suburban towns. The governing body of a county, city or suburban town may elect to change from a civil service commission to the office of personnel officer or vice versa. They may choose to join with another municipality either within the county or on a regional basis to administer civil service jointly under either a commission or personnel officer. The law also establishes the effective dates of such changes, the duration of time before further changes may be made, and the authority of the governing body to revoke its action regarding changes. The advice and counsel of a municipal attorney may be helpful in interpreting and implementing the complicated procedures involved in changing the form of civil service administration.

13.3.3 The Functions of Personnel Administration

The specific responsibilities of a municipal personnel agency vary from one locality to another and from one level of government to another, depending upon size, jurisdiction and numbers of municipal employees. An effectively administered personnel program requires a strong legal base, a comprehensive and concise set of rules and regulations, and assistance and support from the municipality's legislative body.

These components are necessary to achieve continuity of policy and practice and to allow managers to make informed decisions and solve personnel problems. New York State's Civil Service Law includes the following elements in the personnel function: the principle of merit and fitness, rule-making authority, and a procedure for appeal. The administrative guidelines of such a program should emphasize stability of policy and flexibility of procedure. The following paragraphs briefly describe some of the major responsibilities of a personnel organization.

13.3.4 Classification and Salary Plans

Two of the most important functions of a personnel department are position classification and salary administration. To administer an organization effectively, management must have relevant facts about the specific jobs required to accomplish goals and objectives. Management must determine: first, what work must be done to attain the organization's goals; second, what skills are necessary to accomplish this work; and third, how much of this work can be accomplished by one person. On the basis of this information the personnel department classifies positions, determines qualifications and salaries and recruits suitable people to do the work. The information also underlies all testing programs.

The personnel department usually administers a salary plan on the basis of position classification. Sometimes the personnel staff develops the salary plan, but it is common for the department to hire an outside consultant who specializes in the area of personnel administration. However, the final adoption of the plan, including salary and wage scales, is a legislative prerogative. Establishment of a salary policy occurs in two phases: the first determines the general level of wages in an organization; and the second devises a plan to provide consistent internal salary relations. Both social and economic factors affect wage levels in government, and the salary plan must reflect balances between these factors. Wage levels must take the following into consideration:

- financial condition of the organization;
- wage scale of competitors;
- bargaining power of the employees;
- cost of living;
- federal and state regulations;

- internal equity;
- external competitiveness;
- difficulty of work performed;
- education/license required; and
- any special situations, such as hazardous working conditions, shift pay, etc.

13.3.5 Recruitment, Selection and Placement

When the personnel department recruits people to perform jobs, it takes several actions that are part of a continuous process. These actions include recruitment, selection, placement and probation. The recruitment program must reach out and attract the best minds and skills without discrimination. The department may develop and implement affirmative action recruitment programs.

The department then screens applicants for jobs, most frequently by examination and/or interview, and develops lists of eligible candidates. It must plan selection programs carefully so that they include the following kinds of measurements about applicants: skills, knowledge, abilities, personality traits, interests, physical traits (where relevant) and medical conditions.

Working from the eligible list established by the selection process, the department then certifies to the appointing authority the top ranking candidates most qualified for the job. After an individual is appointed, most agencies require a probationary period and provide for periodic performance evaluation. Newly hired employees should participate in an effective orientation and training program during their probation.

The activities composing a municipal personnel program must take place within the limitations and requirements of the state's Human Rights Law as it applies to public employment. This law recognizes as a civil right the opportunity to obtain employment, including public employment, without discrimination because of race, creed, sex, color, age, disability, marital status or national origin. The following practices are among those considered unlawful and discriminatory:

- for an employer to refuse to hire or to discriminate against the employment of an individual or to discharge an employee because of the above factors;
- for an employment agency to discriminate against any individual for these reasons in receiving, classifying, disposing of, or otherwise acting on applications for services;
- for a labor organization to expel or deny membership to an individual for those reasons;
- for an employer or employment agency to promote any advertisement or publication which expresses, directly or indirectly, any prohibited limitations, specifications or discriminations; and
- for an employer, labor organization or employment agency to discharge or expel or otherwise discriminate against any person who has filed complaints pursuant to the Human Rights Law.

In addition, this law specifies that it is an unlawful discriminatory practice for an employer, labor organization or employment agency to control the selection of applicants for apprentice training programs. Numerous other discriminatory practices are listed, but those mentioned above are most specifically related to municipal personnel and training practices.

13.3.6 Performance Appraisal

Every supervisor in a municipal government should conduct a continuous evaluation of an employees' development and whether they utilize their abilities most effectively. Periodic employee performance appraisal promotes the effective operation of an organization. A performance appraisal system:

- informs employees of what is expected of them;
- informs employees of how they are performing;
- recognizes and rewards good work;
- determines employee weaknesses and suggests alternatives for improvement;
- identifies employee training needs;
- maintains a continuing record of employee performance;
- guides promotions, transfers and appropriate placement; and
- checks the reasonableness of performance standards, the accuracy of job descriptions and classification, and the effectiveness of recruitment procedures.

There is no standard method for performance evaluation. Numerous techniques are utilized and each requires a different degree of detail. The organization's objectives and management's concerns usually determine the techniques chosen.

13.3.7 Fringe Benefits and Working Conditions

Personnel administration must also be concerned with working conditions and fringe benefits, as specified in labor agreements. Such items are over and above salaries and wages; they include vacation arrangements, sick leave, insurance policies, retirement plans, physical working facilities, hours of work, and employee safety and health programs.

13.3.8 Training and Development

Recruiting, selecting and placing employees are only the beginning of the personnel program. One of the most important aspects of personnel administration is employee training and development. Every employee must learn certain skills, new techniques, appropriate procedures, etc. Employees must be trained - they must be given the opportunity to learn how to effectively perform their present and future work. Training programs can:

- orient employees to a new job;
- assist employees to acquire specific skills or knowledge required to perform their jobs;
- increase the scope of the employees' experiences and prepare them for greater responsibilities;
- encourage employees to take pride in their work;
- promote concern among employees for their own personal and career development; and
- increase worker safety.

The area of employee training and development has been drawing increased concern and interest over the past several years. Many municipalities are establishing separate training units to plan and administer total training programs. Training is integral to the total personnel process; it influences productivity, morale, motivation and realization of organization goals.

13.3.9 Separation

Another aspect of the personnel process is the development of appropriate procedures for separation. These include such activities as reduction in work force, disciplinary suspensions, terminations and separation during the probationary period. Such procedures as required by the Civil Service Law, the Human Rights Law and several court decisions specify due process must rights be granted to employees.

Civil Service Law specifies the procedures for the discipline and discharge of public employees who: hold competitive class appointments, are veterans or exempt volunteer fire fighters, or have completed five years of continuous service as non-competitive employees. However, local governments may negotiate alternative disciplinary procedures to replace or modify those procedures.

Similarly, Civil Service Law governs the separation due to a reduction in work force of competitive class employees and those who are veterans and volunteer firefighters. In addition, local governments may agree to establish specific layoff procedures for noncompetitive and labor class employees through collective bargaining.

13.4 Federal Acts Affecting Personnel Administration

13.4.1 The Americans With Disabilities Act

The Americans With Disabilities Act, commonly referred to as the ADA (42 U.S.C. section 12101 et seq.), became law in 1990. It is intended to eliminate discrimination against people with qualifying disabilities in all areas of life including employment opportunities, access to governmental services, architectural barriers and telecommunications. Title I of the ADA, Employment, is of importance to local government personnel administration since it makes significant changes to all employment related activities, from recruitment and on the job performance, to attendance at work related social functions. Since its enactment, hundreds of cases concerning the ADA have been decided in the Federal Courts. These, along with implementing regulations promulgated by the United States Equal Employment Opportunity Commission (EEOC) and United States Attorney General, provide guidance for compliance with the Act.

Under Title I of the ADA, no employer, including local governments, may discriminate against an individual with a qualifying disability in the terms and conditions of employment. Under the ADA, an individual is disabled primarily if they have a physical or mental impairment (or are regarded as having such an impairment) which substantially limits one or more of the individual's major life activities, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working and moving. The term "qualified individual with a disability" is defined in section 12111(8) of the Act as:

> "…an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."

Section 12111(9) provides with regard to the term "reasonable accommodation":

> The term "reasonable accommodation" may include:
>
> A. making existing facilities used by employees readily accessible to and useable by individuals with disabilities; and

B. job restructuring, part-time or modified work schedules, reassignment to vacant positions, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

In essence, once a local government has made a determination that an applicant for employment or an existing employee is a qualified individual with a disability; the employer may be obligated, through an interactive process with the employee, to provide the employee with a reasonable accommodation. While there are many rules and nuances to the ADA, some key points to remember are: the employer, not the employee, makes the final decision on what the reasonable accommodation will be; pre-job offer and post-job offer questions and medical examination requirements are dictated by the Act; and if the employee cannot perform the essential duties of the job, even with a reasonable accommodation, the employer need not hire them or may take appropriate steps to separate the employee from service.

Because of the ADA's complexities, it is recommended that local governments confer with knowledgeable counsel, affirmative action officers, and other available sources when confronted with issues arising under the Act.

13.4.2 The Family Medical Leave Act

The Family Medical Leave Act, or FMLA, (29 U.S.C. section 2601 et seq.) became law in 1993. It is intended to balance the demands of the work place with the needs of families. By providing workers faced with family obligations or serious family or personal illness with reasonable amounts of leave, the FMLA encourages stability in the family and productivity in the workplace.

The FMLA gives eligible employees of covered employers the right to take unpaid leave, or paid leave charged to appropriate leave credits under certain circumstances, for a period of up to 12 work weeks in a 12 month period due to: 1) the birth of a child or the placement of a child for adoption or foster care; 2) the employee's need to care for a family member (child, spouse or parent) with a serious health condition; or 3) the employee's own serious health condition which makes the employee unable to do his or her job. Under certain circumstances, FMLA leave may be taken on an intermittent basis. Employees are also entitled to continuation of health and certain other insurances, provided the employee pays his or her share of the premiums during the period of leave.

The employer has a right of 30 days advance notice from the employee, where practicable. In addition, the employer may require the employee to submit certification from a health care provider to substantiate that the leave is due to the serious health condition of the employee or a member of the family. The employer may also require, as a condition of return to work, medical documentation from an employee absent due to personal illness.

13.4.3 The Immigration and Naturalization Act

In 1990, the Immigration and Naturalization Act (Title 8 of the United States Code) provides the foundation for immigration law. It was passed in 1952 and has been amended several times. Section 1324a of Title 8 imposes requirements on employers to attest their examination of certain documents produced by employees that verify employment authorization and identity.

13.5 State Assistance and Training

A number of state agencies and other organizations, offer assistance to local governments in specific areas of staff development or personnel program administration. Training and technical assistance provided by state agencies is intended primarily to improve the capability of local employees whose activities help meet program objectives of those agencies. Summarized below are some of the kinds of training and other assistance available to local governments.

13.5.1 Department of Civil Service

The Department of Civil Service is the primary source of technical assistance to local governments assisting with setting up and operating local personnel programs. Local officials can obtain a variety of specific administrative and operational assistance from the Municipal Services Division of the department. For instance, if a municipality does not have an appropriate eligible list for a position, the department can provide names from appropriate state eligible lists. The list may be limited to residents from the locality or civil division in which the appointments are to be made, and may be used until it runs out or is superseded by a list established by the municipality.

On request, the Department of Civil Service also provides on-site advice and technical assistance concerning the following:

- the State Civil Service Law and municipal rules and regulations;
- job classification systems, job standards and specifications;
- the development of procedural and training manuals;
- the establishment of salary plans and fringe benefits;
- surveys of local civil service or personnel agencies;
- training in municipal personnel practices;
- setting up and conducting examination programs; and
- minority group training and placement.

13.5.2 Other State Agencies

The following list indicates the scope and range of the type of local government training that is offered by other state agencies:

The Education Department provides training for local school superintendents and members of local boards of education.

The Department of Environmental Conservation (DEC) provides in-house training, invests in information management, and partners with universities and other state agencies and professional organizations. These initiatives are designed to help specialized staff, such as wastewater treatment plant operators and air pollution control engineers, meet professional requirements.

The Department of Health provides training to help specialized local government staff, including water treatment plant operators, meet certification requirements.

The Office of Real Property Tax Services provides training to help local assessment officials perform their functions and duties effectively and meet certification requirements.

The Office of the State Comptroller offers training for fiscal officers of local governments.

The Office of Mental Health offers program-related training to staffs of local mental health agencies.

The Office for People with Developmental Disabilities makes its own staff training programs available to appropriate local employees.

The Department of Labor makes available to appropriate local government employees, where possible, its in-service training programs on such matters as placement, supervision and unemployment insurance.

The New York State Office of Children and Family Services (OCFS) makes appropriate training available for local social services program staff and others, including case workers, supervisors, day care workers, parent aides, foster parents and investigators.

The Office of Alcohol and Substance Abuse Services offers training in such topics as counseling, program development and prevention to staffs of local agencies it funds and other appropriate agencies.

The Office of Fire Prevention and Control of the Division of Homeland Security and Emergency Services offers training for local fire fighters about fire services and prevention and hazardous materials.

The State Emergency Management Office (SEMO) of the Division of Military and Naval Affairs provides training for local government emergency management staff on such matters as emergency planning, communication, creative financing, decision making, hazardous materials and legal issues.

13.5.3 Department of State

The Department of State offers certain kinds of technical assistance and training to promote effective local government operations. The department makes available training in enforcement of the Uniform Fire Prevention and Building Code, State Energy Code, land use planning and regulation, management of community action programs, and in specific areas of municipal management. Technical assistance is also provided in the above areas, as well as in municipal law, intergovernmental cooperation, local government organization and operations, sources of financial assistance and local waterfront revitalization.

13.5.4 Other Organizations

Assistance with staff development and training is offered to local governments through a number of non-state organizations. Statewide, these include the municipal associations (NYS Association of Counties, NYS Conference of Mayors and Other Municipal Officials, Association of Towns of the State of New York and the NYS School Boards Association), their affiliate groups, and such specialized organizations as the New York Planning Federation. These organizations often provide training at their annual meetings or through special seminars, and they frequently accommodate training sessions of state agencies and other organizations at their meetings.

13.6 Summary

Effective personnel administration at the local government level requires:

- compliance with New York State Civil Service and Human Rights laws, Federal laws and local civil service rules and regulations;
- formalized personnel policy;
- strong but flexible legal framework;
- organized activities;
- clearly defined goals and objectives;
- concern for human factors as well as for operational results;
- positive personnel activities to stimulate and motivate employees;
- concern for employee development; and
- awareness of the need for, and benefits of, training and education.

Chapter 14

Labor-Management Relations

Collective bargaining became a legal right of public employees at all levels in New York State in 1967. Unionization of public employees spread rapidly the state. A set of procedures developed within the provisions of the Taylor Law, which now regulates labor-management relations in government at the local as well as the state level.

All local governments in the State of New York are public employers. Local Government officials need to be aware of and understand the rules and procedures that apply to relations between the governmental unit and its employees.

14.1 Historical Background

Prior to 1967, public employees in New York State did not have a statutory right to bargain collectively. The only statute regulating conditions of employment for public employees, the Condon-Wadlin Act of 1947, did not give public employees any rights to participate in decisions regarding such conditions. This act, passed following labor disputes among public employees in Rochester, Buffalo and New York City, prohibited strikes by public employees and established severe penalties for violation of its provisions.

The Condon-Wadlin Act failed to make any provision for the amelioration of conditions which led to strikes. The growing realization that the Condon-Wadlin Act did not deter strikes, combined with an increasing demand by public employees for bargaining rights, generated pressure for amendment or replacement of the act. Several bills to do so were introduced in the State Legislature between 1960 and 1963, but none passed. They generally provided for some modification of penalties for striking and for the establishment of various forms of grievance procedures for public employees.

Several events in the 1950's and early 1960's encouraged employees of state and local governments had been to assert their desires for collective negotiations. In 1950, Governor Thomas E. Dewey guaranteed to state employees the right to join employee organizations and created a grievance procedure. In 1954, Mayor Robert Wagner of New York City issued an interim Executive Order that granted limited collective bargaining rights to New York City transit workers. In later years, other employee groups were also granted these rights.

Interest in collective bargaining for public employees was also stirring in the State Legislature. In 1962, a staff report to the Joint Legislative Committee on Industrial and Labor Conditions stressed the need for a "more rational labor relations program for public employees."

The strike penalties of the Condon-Wadlin Act were softened for a period between 1963 and 1965. However, the original act was restored, when two work stoppages occurred in New York City in the following year. When the penalties prescribed by the Condon-Wadlin Act were once again circumvented, Governor Rockefeller responded by appointing a blue ribbon committee on public employee relations. The legislation proposed by this committee, and enacted in 1967, came to be known as the Taylor Law (named for its chairman, George Taylor). The Taylor Law

thus became the first comprehensive labor relations law for public employees in New York State and was among the first in the country. The Taylor Law applies to the State of New York, its counties, cities, towns, villages, public authorities, school districts, and certain of its special service districts.

The Taylor Law:

- grants public employees the right to organize and negotiate collectively with their employers;
- gives public employees the right to be represented by employee organizations of their own choice;
- requires public employers to negotiate with their employees and enter into written agreements with public employee organizations representing specific negotiation units of workers;
- establishes impasse procedures for the resolution of deadlocks in negotiations;
- mandates binding arbitration of disputes in police and fire negotiations;
- prohibits as “improper practices” certain acts by employers and employee organizations;
- prohibits strikes by public employees; and
- establishes a neutral agency — the Public Employment Relations Board (PERB) to administer the law and “referee” public sector labor relations.

14.2 The Public Employment Relations Board

The Public Employment Relations Board (PERB) is an integral part of the Taylor Law’s philosophy of labor relations. This board was created to serve as an independent, neutral agency to administer the provisions of the Taylor Law and to promote cooperative relationships between public employers and their employees. To this end, PERB has the following functions and powers:

- administration of the Taylor Law statewide within a framework of policies set by the Legislature;
- adoption of rules and regulations;
- resolution of representation disputes;
- provision of conciliation service to assist contract negotiations;
- adjudication of improper practice charges;
- determination of culpability of employee organizations for striking and order of forfeiture of dues and agency shop fee check-off privileges as a penalty; and
- recommendation of changes in the Taylor Law.

Although the Taylor Law provides local governments with the option of handling their own public employment relations matters, few have chosen to do so. At one time, there were 34 local boards, but only five remain in existence. These local boards exercise most of the responsibilities of the state PERB, but have no jurisdiction over improper practice charges and do not perform research.

In New York City, the Office of Collective Bargaining (OCB) fulfills PERB functions. For several years, authority over improper practice cases in New York City resided with PERB, but in 1979 the Legislature returned this responsibility to OCB.

14.3 Elements in the Bargaining Process

14.3.1 The Negotiating Unit

A negotiating unit is a group of employees who are held by PERB to constitute a body appropriate for bargaining purposes, or who are voluntarily recognized as such by a public employer. All employees of the jurisdiction may be joined into a single unit for purposes of collective bargaining, or they may be divided into several separate units which negotiate independently. The latter is more common.

When the employer "recognizes" the unit, no legal proceedings are necessary to determine the unit's composition. However, when the employer does not recognize the unit, PERB must determine its appropriateness. The Taylor Law specifies that PERB must apply certain standards in determining negotiating units.

PERB also may exclude management/confidential personnel from negotiating units. Management personnel are employees who formulate policy, are directly involved in collective bargaining, or have a major role in administering a collective bargaining agreement or personnel administration. Confidential employees are those who assist or act in a confidential capacity to management personnel who are directly involved with labor relations, contract administration or personnel administration. Both the state and local governments that wish to exclude management/confidential personnel from existing negotiating units may apply to PERB for such exclusions. Negotiating units may also apply to PERB to have management/confidential positions reclassified as negotiating unit positions.

14.3.2 The Bargaining Agent

After the appropriate negotiating unit is defined by employer recognition or by PERB, employees in the unit may exercise the right to be represented by an employee organization of their choice. The chosen organization, once it is recognized or certified, is known as the "bargaining agent" and serves as the exclusive representative of all workers in the negotiating unit, whether or not they are members of the union.

Public employers may voluntarily recognize a particular employee organization as the bargaining agent for a specific negotiating unit. This action is called "recognition." If, however, the employer does not voluntarily recognize the employee organization, the union must petition PERB for certification, which designates the union as the exclusive bargaining agent for all employees in the negotiating unit for a fixed period of time.

PERB may conduct an election among the members of the negotiating unit to determine which bargaining agent should be certified. Employees face different choices in different elections: they may be asked to choose between competing employee organizations or between an organization and no bargaining agent. After an election, PERB certifies the winner as the bargaining agent. In most cases where only one union seeks bargaining agent status, an election is not held. Rather, PERB grants certification upon a showing by the employee organization that the majority of members in the negotiating unit have signed cards — generally dues check-off cards — indicating their support for the organization seeking certification.

Once certified, the union has the right to represent the employees in the bargaining unit without challenge by the employer or another organization until seven months before the expiration of the collective agreement between the union and the employer. One month earlier, a "window period" opens. During this period, petitions may be filed to change the negotiating unit.

Changes in the certification itself may also occur during the window period. For example, a challenging employee organization may launch a petition drive at this time to force an election against the incumbent bargaining agent. If the challenger demonstrates sufficient support (30 percent of the members of the unit), PERB will schedule an election giving employees a choice between the challenger, the incumbent bargaining agent, and no representative.

14.3.3 Contract Bargaining

Once the bargaining agent has been certified, the Taylor Law requires a public employer negotiate with the bargaining agent over the wages, hours, and other terms and conditions of employment for employees in the negotiating unit. The Taylor Law charges both employers and employee organizations to bargain in good faith. Generally, public employers should be aware that for them good faith means:

- bargaining with employee organizations at reasonable times and places;
- listening to and considering bargaining positions put forth by employee groups with respect to terms and conditions of employment; and
- working positively toward a settlement.

Good-faith bargaining does not require employers to agree to specific union proposals, either in whole or in part, nor does it require employers to make counter proposals to specific union demands. However, good faith does require that both parties negotiate with the intention of concluding an agreement.

14.3.4 Scope of Bargaining

The scope of negotiations — the actual subject matter that management and labor may negotiate at the bargaining table — is broad. As the New York State Court of Appeals noted in its landmark Huntington decision:

> "Under the Taylor Law, the obligation to bargain as to all terms and conditions of employment is a broad and unqualified one, and there is no reason why the mandatory provision of that act should be limited in any way except in cases where some other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to a term or condition of employment." [1]

PERB categorizes subjects of negotiations as mandatory, non-mandatory or prohibited.[2]

The parties must, upon demand, negotiate mandatory subjects of collective negotiations, and the employee bargaining agent and the employer must jointly reach a decision. Examples of mandatory subjects are:

- wages — all compensation paid to public employees;
- fringe benefits — sick and personal leave time, vacation time, and medical insurance;
- hours of work — the amount of time spent on the job;
- seniority — preference accorded employees on the basis of length of service;
- grievance procedure;
- subcontracting — a decision to let out to a private contractor services currently being performed by public employees; and
- impact on unit members of a reduction in work force.

[1] Board of Education of UFSD No. 3, Town of Huntington v. Associated Teachers of Huntington, 30 N.Y. 2d 122, 331 N.Y.S. 2d 17 (1972).

[2] The lists of mandatory, nonmandatory and prohibited subjects in this section are drawn from PERB case law and court decisions. PERB provides full summaries on request.

Non-mandatory — permissive — subjects of negotiation are those issues which are negotiable on a voluntary basis. These issues do not involve working conditions and are management prerogatives. A management prerogative is an act or a decision which relates directly to the authority of a public employer to establish government policy in accordance with its public mission. Examples of non-mandatory subjects of negotiation include:

- overall policies and mission of government;
- residency requirements for future employees;[3]
- employment qualifications; and
- filling of vacancies.

Non-mandatory subjects which have been voluntarily agreed upon and incorporated into a collective bargaining agreement are deemed converted into mandatory subjects of collective negotiations.[4]

Prohibited subjects may not be negotiated under any circumstances. As noted earlier, a public employer's obligation to bargain terms and conditions of employment is broad.

Prohibited subjects of negotiation are few, but include: retirement benefits, except the negotiation of improved retirement benefits among the options offered by the state, and subjects void as against public policy.

Local governments should recognize that they may be bound not only by the terms which are spelled out in their negotiated agreements but also by practices that have developed in the workplace over a period of years. These work conditions are called "past practices," and if they constitute terms and conditions of employment they generally may not be changed without negotiation.

14.3.5 Resolution of Bargaining Deadlocks

Strikes or lockouts are sometimes invoked to break bargaining deadlocks in the private sector. The Taylor Law, which prohibits strikes, prescribes several forms of third-party intervention to resolve bargaining deadlocks. The Taylor Law also allows negotiating parties to develop jointly their own procedures for breaking deadlocks. Either bargaining party, or PERB, may declare an impasse at anytime within 120 days before the date the contract expires. Table 14.1 [157] illustrates the sequence of the three different impasse procedures in the law.

Table 14.1: Steps to Resolve Bargaining Deadlock

Step	Police and Firefighters, New York City Transit and Miscellaneous other Public Safety Personnel	Educational Personnel	All Others
I	Impasse declared by PERB	Impasse declared by PERB	Impasse declared by PERB
II	Mediation	Mediation	Mediation
III	Binding arbitration	Fact finding	Fact finding
IV		Continued negotiations until agreement is reached	Legislative hearing
V			Legislative settlement

[3] Residency requirements for current employees are a mandatory subject of negotiations.
[4] City of Cohoes, 31 PERB 3020 (1998).

14.3.5.1 Mediation

A mediator, appointed by PERB, acts in a confidential capacity to each side. While acting as a buffer between the parties, the mediator attempts to revive the bargaining process. If the mediator effects an agreement, the result is the same as if the bargaining parties had successfully completed negotiations on their own.

14.3.5.2 Fact Finding

PERB may appoint a fact finder who: takes evidence; may hold hearings; receive data, briefs and other supporting information; and then makes public recommendations for a settlement. Only mandatory subjects of negotiations may be taken to fact finding, unless the parties agree mutually to do otherwise. PERB encourages fact finders to mediate after they issue their reports to help reconcile remaining differences.

14.3.5.3 Legislative Hearing and Settlement

One or both parties may reject the fact finder's recommendations. The legislative body may, after a hearing required by the law, "…take such action as it deems to be in the public interest, including the interest of the public employees involved." While the Taylor Law is silent with respect to the length of a legislatively imposed settlement, PERB has determined that one-year terms are appropriate. Legislatively imposed settlements are, in fact, extremely rare since the parties in most cases reach settlement through negotiations. A resolution imposed by the legislative body may not change the terms of an expired collective bargaining agreement without the union's consent. It may, without the union's consent, reimpose the terms of the expired agreement or impose new terms which do not change any of the terms of the expired agreement.

14.3.5.4 Board Meeting

In education disputes the Taylor Law provides that PERB may give the parties a chance to explain their positions on the fact finder's report at a meeting at which the legislative body (i.e., the school board) or its committee is present. However, PERB views the law to mean that there is no final resolution in educational unit disputes except through agreement between the bargaining parties. In cases where the fact finder's report does not result in agreement, PERB will make further mediation efforts at its discretion. This assistance is called "conciliation."

14.3.5.5 Binding Arbitration

In police, fire fighter and other miscellaneous disputes, a three-member tripartite panel chosen by the parties hold hearings and decide each issue by majority vote. Only mandatory subjects may be taken to binding arbitration. Issues may be returned to the parties for further negotiation. A panel's determination is final and binding on the employer and employees, subject to appropriate judicial review.

Strikes

The Taylor Law expressly prohibits "…any strike or other concerted stoppage of work or slowdown by public employees." In the event of a strike:

- PERB may order the suspension of the dues and agency shop fee check-off privileges of the employee organization upon its own finding that a strike has occurred;

- the employer may initiate disciplinary action against individual employees involved in the strike;
- the public employer is required to deduct two days' pay from each striking employee for each day (or part thereof) on strike. Employees must pay income taxes on the full amount of wages lost; and
- the public employer must seek a court injunction against the striking organization.

If an injunction is ignored, the court may impose fines against the organization and jail terms of up to 30 days against union leaders.

14.3.6 The Agreement

The Taylor Law requires that all negotiated contacts be in writing upon demand. When negotiations are concluded, PERB's role is limited to serving as a repository for the final agreement. A 1977 amendment of the Taylor Law excludes PERB from any role involving enforcement of a negotiated agreement. PERB's authority is limited to review of actions which constitute improper employer or employee practices.

14.4 Improper Practices

The orderly conduct of labor-management relations requires that all participants conform to mutually recognized and equitable standards in fulfilling their obligations under the law. As a result, the Taylor Law prohibits certain practices of management and labor, such as interference with the representation rights of employees or the orderly flow of collective negotiations.

14.4.1 Practices Prohibited

Employers:

- interference with, restraint or coercion of public employees in the exercise of their right to form, join or participate in, or to refrain from forming, joining or participating in, any employee organization, for the purpose of depriving the employees of such rights;
- domination of or interference with the formation or administration of any employee organization, for the purpose of depriving the employees of such rights;
- discrimination against any employee for the purpose of encouraging or discouraging membership in, or participation in, the activities of any employee organization;
- refusal to negotiate in good faith;
- refusal to continue any of the terms of an expired collective bargaining agreement until a new agreement is negotiated; and
- using state funds to discourage union organizing.

Activities Prohibited — Employee Organizations:

- interference with, restraint or coercion of public employees in the exercise of their right to form, join or participate in, or to refrain from forming, joining or participating in, any employee organization;

- causing, or attempting to cause, a public employer to interfere with these employee rights;
- refusal to negotiate in good faith; and
- breach of its duty to fairly represent all employees in the negotiating unit.

A party which believes that one of its rights has been violated may file an improper practice charge with PERB.

The Taylor Law gives PERB broad remedial authority in issues regarding a refusal to negotiate in good faith. For example, if PERB were to find that an employer has increased the hours of work without negotiation upon contract expiration, PERB might order restoration of the old work schedule and award compensation to affected employees. On some rare occasions, PERB has found that improper practices by employers were of such magnitude as to constitute a provocation of a subsequent strike. In these cases, PERB limited the length of time the bargaining agent lost its dues and agency shop fee check-off privileges.

The major purpose of the improper practice procedure is to establish and preserve rules of fair play in the conduct of labor-management relations.

14.5 Contract Administration

It has been said that management is no more than halfway through the labor relations job when a signed agreement is achieved. While negotiation is the more visible phase of collective bargaining, the real payoff is in day-to-day working relationships.[5]

The management task is far easier when contract terms are clear and unambiguous, but even then, certain responsibilities commonly arise in all contract situations. Management shares with union officials the duty to explain and interpret new contract provisions. In addition, government officials should always be available to meet with employee representatives to learn about changing employee attitudes and problems.

Since employee organizations are the chosen representatives of the employees, government officials should take care not to bypass union agents or undermine the union's authority.

Government officials should exercise care in the administration of a contract, because failure to do so may result in employee grievances. For this reason, larger jurisdictions often retain an employee relations staff to provide expert advice in contract administration.

14.5.1 Grievance Procedures

Grievance procedures provide a method for settling disputes that arise concerning the meaning or application of an existing collective bargaining agreement.

The United States Department of Labor has summarized the function of a "grievance procedure" as follows

> "The essence of a grievance procedure is to provide a means by which an employee, without jeopardizing his job, can express a complaint about his work or working conditions and obtain a fair hearing through progressively higher levels of management." [6]

[5] Dale Yader, et al., Handbook of Personnel Management and Labor Relations (New York: McGraw-Hill Book Co., Inc., 1958), p. 431.

[6] Collective Bargaining Agreements: Grievance Procedures (U.S. Department of Labor, Bureau of Labor Statistics Bulletin No. 142501, Washington, D.C., 1964), p. 1.

The requirement that public employers in New York State establish grievance procedures predates the Taylor Law. As early as 1962, the General Municipal Law required that all public employers with more than 100 employees provide a grievance procedure conforming to specified statutory standards. Under the Taylor Law, public employers must negotiate a grievance procedure with the recognized or certified bargaining agent.

Most grievance procedures culminate in binding arbitration. This type of arbitration is called "rights arbitration," because it involves resolution of a dispute as to an employee's rights under an existing collective bargaining agreement. It should be distinguished from "interest arbitration" for police and firefighters in New York State, which involves resolution of a dispute over the terms of a new collective agreement. Whether or not a grievance procedure culminates in binding arbitration is a subject of negotiation.

14.5.2 Union Security

Union security arrangements are devices to assure the financial support of employee organizations. Union security arrangements available under the Taylor Law are the right of exclusive representation and membership dues deduction. The Taylor Law entitles all recognized or certified bargaining agents to an automatic deduction of union dues from employees' wages once the agent obtains signed authorization cards. This helps an employee organization in two ways. First, it reduces dues collection expenses significantly. Second, it is easier and more likely for the organization to maintain a large membership because the organization does not have to rely on employees for periodic payment of dues. If an employee organization engages in an illegal work stoppage, PERB may withdraw the dues and agency shop fee check-off privilege for a period of time. However, individual employees may with draw their dues or agency shop fee authorization at any time.

The Taylor Law requires an employer to deduct an agency shop fee deduction from the salary or wages of employees in the unit who decide not to become a member of the union. An agency shop fee requires an employee who does not join a union that represents his bargaining unit to pay a service fee substantially equal to the dues of that union. The employee need not join the union. The principal rationale of the agency shop fee is that all employees should share the costs of representation incurred by the bargaining agent.

14.5.3 Retirement Systems

Among the fringe benefits of public employment are retirement benefits. These are long-term liabilities upon the employer, and they are also a major element of employee concern in labor management relations.

The New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System serve as the administrators of the pension system for virtually all public employees, except teachers, outside of New York City.

Each jurisdiction participating in these systems was previously able to select from a broad spectrum of retirement plans. However, since 1976, members' benefits generally have been determined by the date the employee becomes a member of the retirement system.

The New York State Teachers' Retirement System covers academics in school districts throughout the state. New York City operates five retirement systems for the benefit of City employees.

The cost of a pension system depends on three variables: the number of employees covered by the plan; the salaries paid these employees; and the specific terms or benefits of the pension plan.

An increase in any of these factors has the effect of creating unfunded pension liabilities which must be amortized by an increase in the amount of money contributed to the pension system and/or increased earnings on invested assets.

While the effect of increasing the number of employees is fairly obvious, the latter two variables have a somewhat different effect. For changes in these it is necessary to increase payments to the pension system in order to compensate for past payments based on the lower previous salary rates or benefits, as well as for future payments. Thus, changes in salaries or pension benefits have a retroactive, as well as prospective effect on the costs of a pension system.

14.6 Summary

The practice of labor-management relations has matured since passage of the Taylor Law in 1967. The Taylor Law's primary purpose was to bring order to public sector labor relations under commonly understood rules of behavior. After a period of hesitancy and confusion this goal has, to a large extent, been achieved. New relationships have developed that previously would have been unimaginable. Future changes in labor-management relations are more likely to be incremental than fundamental.

Chapter 15

Public Services

Local governments provide services essential to daily living. Some services fulfill basic human needs for food, shelter and medical care. Others provide an attractive environment and opportunities for recreational and cultural activities. Since many public services are shared responsibilities among units of government, local officials need to understand the organization, structure and interplay of various government units to achieve better delivery of services.

15.1 State Agency Operations

State agencies are the operating arm of state government. By virtue of their many functions and services, state agencies often are in close contact with local governments. State agencies vary widely in terms of purpose, authority and nature of services. Some agencies, such as the Office of the State Comptroller and the Office of Real Property Tax Services, have functions so extensively related to basic local government operations that they are treated in detail elsewhere in this Handbook. Others, like the Health Department, play highly significant roles in determining how local governments provide certain services. Programs of some agencies, such as the departments of Education, Environmental Conservation, Health, and Motor Vehicles, often touch upon citizens as they go about their daily affairs. Services of these agencies involve or affect many individuals, have an enormous fiscal impact and involve the exercise of authority over local governments which deliver these services. Other agencies, such as the Departments of Labor and Transportation, affect the public directly by channeling funds for local, as well as for state or federal purposes.

Many agencies serve the public directly through the exercise of regulatory authority. The Department of Public Service, through the Public Service Commission, regulates utility rates, and has a role which is almost exclusively regulatory. Many agencies provide services directly to the public and to local governments. Under Article 6-B of the Executive Law, the Department of State is authorized to provide assistance to local governments, and much of this assistance is in the areas of coastal management, community development, economic opportunity, intermunicipal cooperation, labor relations, legal assistance, organization and management improvement, and basic planning and zoning training. Other agencies and departments are primarily service-oriented, and neither regulate local activities nor administer major grant programs. Among these are the Office of General Services and the Department of Financial Services. Such agencies provide help to local governments largely in the form of technical assistance, informational materials, training, inspection services and/or legal advice.

15.2 Social Service and Public Health Programs

15.2.1 Children and Family Services

The Office of Children and Family Services (OCFS) integrates services for children, youth and families, and vulnerable adult populations. OCFS promotes the development of its client population and works to protect them from violence, neglect, abuse and abandonment. OCFS regulates and inspects child care providers and administers funds to child care programs. It supervises and regulates protective services for adults; inspects, supervises and monitors foster care agencies; administers the State Adoption Service; and operates the Statewide Central Register of Child Abuse and Maltreatment (SCR).

The New York State Commission for the Blind (NYSCB) within OCFS administers services to legally blind citizens and assists eligible individuals with job training and placement. The agency also operates a residential care system consisting of five limited-secure facilities, four secure centers, two non-secure centers and one reception center. There are also 15 Community Multi-Services Offices (CMSO) statewide that are responsible for services to youth and families from the first day of placement. OCFS works closely with municipalities, local social services districts and county youth bureaus so that adequate youth development services and programs are available. A plan for youth development services is prepared through the county comprehensive planning process. The county departments of social services and New York City's Administration for Children Services (ACS) administer local foster care programs and child welfare services.

15.2.2 Programs for the Aged

The New York State Office for the Aging plans and coordinates programs and services for more than three million New Yorkers aged 60 and over. As a primary advocate for older New Yorkers, the Office is empowered to review and comment on state agencies' program policies and legislative proposals which may have a significant impact on the elderly. The Office identifies issues and concerns through its two advisory committees --- the Governor's Advisory Committee on Aging and the Aging Services Advisory Committee. In addition, the Office conducts public forums throughout the state.

The Office operates a statewide toll-free Senior Citizens Hot Line at 800-342-9871, which is staffed during normal business hours. Hot Line staff provides information, crisis intervention and problem solving assistance, and maintain current county-by-county resource files of services. Further information is made available through the Office's websites, its quarterly newsletter, and television programs which air on cable-access stations across the state.

The Office for the Aging cooperates with and assists local governments in developing and implementing local programs. With the exception of grants-in-aid the Office's programs are administered through the 59 local offices for the aging which serve the citizens of the state. Such programs include: the Community Services for the Elderly Program (CASE), which provides community-based, supportive services to frail, low-income elderly who need assistance to maintain their independence at home; the Expanded In-home Services for the Elderly Program (AESOP), managed by local offices for the aging, which is a uniform, statewide program of case management, non-medical in-home services, respite and ancillary services for the elderly who need long term care but are not eligible for Medicaid; the Supplemental Nutrition Assistance Program (SNAP), which provides home-delivered meals and other nutritional services to at-risk elderly; the Retired and Senior Volunteer Program (RSVP), which recruits and places older adults and retirees in volunteer positions tailored to their talents, skills and interests; the Foster Grandparent Program, which provides an opportunity for low-income people aged 60 and over to provide companionship and guidance to children with special or exceptional needs; and the grants-in-aid, through which funds are appropriated by the Legislature to the Office for contracts to public and private not-for-profit agencies to provide a range of locally-determined services for older New Yorkers.

The Office for the Aging also administers statewide plans under the federal Older Americans Act, including: Title III-B, which provides for advocacy, planning and coordination of services including transportation, information

and referral outreach, in-home and legal services to meet specific needs of the elderly; Title III-C-1, which provides for nutritious meals and other services to the elderly and their spouses of any age, in congregate settings; Title III-C-2, which provides for nutritious meals to the homebound elderly and their spouses of any age; and Title V, which provides for part-time employment, training and placement assistance for low-income individuals aged 55 and over.

15.2.3 Temporary and Disability Assistance

The State Office of Temporary and Disability Assistance (OTDA) promote personal self-sufficiency through the delivery of temporary assistance, disability assistance, and the collection of child support. OTDA is responsible for providing policy, technical and systems support to the state's 58 social services districts. OTDA provides economic assistance to aged and disabled persons who are unable to work and transitional support to public assistance recipients while they are working toward self-sufficiency. The Division for Disability Determinations evaluates the medical eligibility of disability claimants for the federal Supplemental Security Income (SSI) and Social Security Disability Insurance. The ODTA's programs include Family Assistance, Safety Net Assistance, Supplemental Security Income, Food Stamps, Home Energy Assistance (HEAP), Child Support Services, Housing Services, and Refugee and Immigration Services. The State has been divided into 57 county and one city (New York City) social services districts for purposes of providing public assistance and care. A Commissioner heads each of the local social services districts. This official has responsibility for administration of public assistance, medical assistance and social services, and must implement the policies and programs which the OTDA, Department of Health (DOH), OCFS, Department of Labor (DOL) and the federal government formulate. The Commissioner also supervises the expenditure of public funds allocated to his or her district.

15.2.4 Community Services Block Grants

Created in 1981 by the federal Omnibus Budget Reconciliation Act, this program was reauthorized by the "Community Opportunities Accountability, and Training and Educational Services Act of 1998" for the purpose of reducing poverty, revitalizing low-income communities, and empowering low income families and individuals in rural and urban areas to become fully self-sufficient. Federal funds are allocated to provide direct services, mobilize resources and organize community activities to assist low-income and poor individuals. Grantees provide comprehensive services to solve problems that block the achievement of self-sufficiency, helping to secure employment, attain an adequate education, maintain a suitable living environment, and meet emergency needs.

Most of the Community Services Block Grant (CSBG) funds allocated to New York are awarded as a statutory allocation to designated eligible entities, which include community action agencies (CAAs) serving every county in the state and organizations serving migrant and seasonal farm workers. Also funded are four Indian tribes and tribal organizations. At the state level, funds are set aside to be used by grantees in the event of a disaster and to provide professional development opportunities to the staff and board members of grantee agencies. Under state and federal law, one-third of the members of CAA boards of directors must be elected local officials. The local government/CAA partnership is strengthened by the direct appropriation of non-federal funds to assist in the delivery of comprehensive human services by CSBG grantees.

15.2.5 Public Health Programs

15.2.5.1 Shared Responsibilities

The State and local governments share responsibility for public health. As of 2007, two cities and 33 counties maintain full-time health agencies. In the absence of a local health department, the district office of the State Department of Health (DOH) provides appropriate services.

15.2.5.2 Regulatory Functions

DOH oversees and regulates all of New York's residential health facilities, adult homes, emergency medical services providers, managed-care organizations, hospitals, diagnostic and treatment centers (clinics), and home-care providers. DOH's Office of Health Systems Management ensures that providers render services in accordance with state and federal standards. The Office also reviews and certifies health-provider applications to construct, renovate, add or delete beds or services, and purchase major new equipment. Other regulatory activities relate to adequate water supply, the avoidance and/or elimination of environmental health problems and the control of sanitation in food establishments.

15.2.5.3 Direct Services

DOH works closely with local health and social services agencies to provide funding and assistance in a variety of direct services to families and individuals. These include communicable disease control, child health, nutrition, dental health and handicapped children's programs.

15.2.6 Mental Hygiene Programs

Scope of Programs: The State's mental hygiene programs are overseen by three autonomous agencies that together constitute the State Department of Mental Hygiene: the Office of Mental Health (OMH), the Office for People With Developmental Disabilities (OPWDD), and the Office of Alcoholism and Substance Abuse Services (OASAS). OMH provides special care and treatment to approximately 772,000 individuals per year through the direct provision of services in State-operated programs, and indirectly through the regulation and funding of voluntary-operated community-based services. OMH also performs research through two State-operated research institutes. OPWDD currently provides services to more than 136,000 individuals with intellectual and developmental disabilities. While some services are provided directly by the State, private not-for-profit agencies provide approximately eighty percent of the services for people with developmental disabilities. This service system has evolved from one which was institutionally-based to one which is now community-based with an emphasis on person-centered approaches. OPWDD also performs research through a State-operated research institute. All services are certified and regulated by OPWDD. OASAS oversees one of the largest chemical dependence service systems in the nation, which includes a full array of services to address prevention, treatment, and recovery. OASAS is also responsible for the prevention and treatment of problem gambling. During 2015, the OASAS chemical dependence treatment system served approximately 234,000 individuals through crisis, inpatient, residential, outpatient, and opioid treatment programs. These individuals were served in 12 State-operated programs and over 900 OASAS-certified community-based programs. Approximately 336,000 youth received a direct prevention service during the 2015-16 school year.

15.2.7 The Local Role

The Mental Hygiene Law (Section 41.13) requires local governments - specifically, counties and the City of New York - "to direct and administer the development of a local comprehensive plan for all [mental hygiene] services," which must be submitted to the respective mental hygiene agencies on an annual basis. These local plans consequently inform the respective State mental hygiene agencies' statewide comprehensive plans, pursuant to Section 5.07 of NYS Mental Hygiene Law.

15.2.8 Alcoholism and Substance Abuse Programs

The Office of Alcoholism and Substance Abuse Services (OASAS) is responsible for licensing and evaluating service providers, and for advocating and implementing policies and programs for the prevention, early intervention,

and treatment of alcoholism and substance abuse. In cooperation with local governments, service providers and communities, OASAS works to ensure that a full range of necessary and cost-effective services are provided for addicted persons and those at risk of addiction.

15.2.8.1 The Federal Role

Federal funding is provided to the State under the Substance Abuse Prevention and Treatment (SAPT) Block Grant. Block grant funds are made available to localities in accordance with OASAS funding policies and procedures.

15.2.9 The State Role

OASAS directly operates 13 Addiction Treatment Centers, which provide inpatient rehabilitation serves to approximately 7,000 patients annually. It also licenses, regulates and funds over 1, 200 private, non-profit, local government and school district prevention and treatment service providers.

15.2.10 The Local Role

Local Governmental Units (LGU) are responsible for assessing local needs and developing necessary resources. Service providers, counties, and the City of New York, develop Local Services Plans, which form the basis for the Office's Comprehensive Five-Year Plan.

15.3 Community Development

15.3.1 Affordable Housing

15.3.1.1 Housing and Community Renewal====

The Division of Housing and Community Renewal's (DHCR) mission is to make New York a better place to live by supporting community efforts to preserve and expand affordable housing, home ownership and economic opportunities, and by providing equal access to safe, decent and affordable housing. The DHCR is responsible for the supervision, maintenance and development of affordable low and moderate-income housing. The Division performs a number of activities in fulfillment of this mission, including: oversight regulation of the state's public and publicly-assisted rental housing; administration of housing development and community preservation programs, including state and federal grants and loans to housing developers to partially finance construction or renovation of affordable housing; and administration of the rent regulation process for more than one million rent-regulated apartments in New York City and in those localities in the counties of Albany, Erie, Nassau, Rockland, Schenectady, Rensselaer and Westchester subject to rent laws.

15.3.1.2 Housing Finance Agency

The New York State Housing Finance Agency (HFA) was created as a public benefit corporation in 1960, under Article III of the Private Housing Finance Law, to finance low-income housing by raising funds through the issuance of municipal securities and the making of mortgage loans to eligible borrowers. In recent years, HFA has also financed federally subsidized low-income housing developments. The Agency's employees are specialists in real estate finance and law, capital market financing, asset management, construction and program development. Together, they encourage and assist in the creation of affordable housing to meet the needs of the state's residents.

Housing Trust Fund Chapter 67 of the Laws of 1985 created the Housing Trust Fund Corporation (HTFC), a public benefit corporation which administers the Low-Income Housing Trust Fund Program (HTF). The Housing Trust Fund Program was established under Article XVIII of the Private Housing Finance Law to help meet the critical need for decent, opportunities for low-income people. HTF provides funding to eligible applicants to construct low-income housing, to rehabilitate vacant or underutilized residential property, or to convert vacant non-residential property to residential use for occupancy by low-income homesteaders, tenants, tenant-cooperators or condominium owners.

15.3.1.3 Affordable Mortgages

The State of New York Mortgage Agency (SONYMA) is a public benefit corporation created by statute in 1970. The purpose of SONYMA is to make mortgages available to low and moderate income first-time buyers and to other qualifying home buyers. Under its various programs, SONYMA purchases new mortgages from participating lenders across the state. Funds for SONYMA's low interest mortgages are derived primarily from the sale of tax-exempt bonds although some funding has come from the sale of taxable bonds. Since its inception through October 31, 1998, SONYMA has issued approximately $9.7 billion in mortgages.

15.3.1.4 Municipal Housing

Through a special act of the State Legislature, any city, village or town may create a housing authority. As of the end of the 1998 session, 186 municipal housing authorities had been created. A municipal housing authority has the power to investigate living conditions in the municipality and determine where unsanitary or substandard housing conditions exist. The authority may construct, improve or repair dwelling units for persons of low income. In addition, an authority can construct and revitalize stores, offices and recreational facilities in a depressed neighborhood. A municipal authority may undertake projects with funds obtained solely from the sale of its bonds to private individuals, firms or corporations, provided that the municipality approves the project. Authorities may also receive assistance from the state and federal government.

15.3.2 Appalachian Regional Development

The Appalachian Regional Development program, administered at the federal level by the Appalachian Regional Commission (ARC) and in New York by the New York State Department of State, is a joint federal/state/local program which seeks to improve the economy and quality of life in a region covering parts of 13 states. In New York, 14 counties are eligible for assistance: Allegany, Broome, Cattaraugus, Chautauqua, Chemung, Chenango, Cortland, Delaware, Otsego, Schoharie, Schuyler, Steuben, Tioga and Tompkins. The Department of State prepares an annual State Strategy Statement which guides the Appalachian Regional Investment package for submission by the Governor to ARC. This package includes local and regional projects in any of the five Strategic Goal areas: (1) skills and knowledge—which includes projects for basic skills, educational excellence, child care programs and telecommunications; (2) physical infrastructure; (3) community capacity—which includes leadership and local assistance demonstration projects; (4) dynamic local economies—which includes business development and assistance projects focusing on local development, and recapitalization of existing regional revolving loan funds; and (5) health care projects—which includes telemedicine and rural health projects.

15.3.3 The Arts

Established in 1960, the New York State Council on the Arts is a funding agency that provides support towards the activities of nonprofit organizations in the state and helps to bring artistic performances and high quality programs

to the state's residents. The Council invites nonprofit organizations that meet eligibility requirements to apply for local assistance funds to provide cultural services to the people through Cultural Services contracts. These services cover a broad range of activities. The State and Local Partnership Program (SLP) fosters the growth and development of the arts and culture at the local level. SLP primarily supports multi-arts organizations that are committed to the long-term cultural development of their communities or regions. Financial support is currently available in 16 program areas including architecture, planning and design, arts in education, capital projects, dance electronic media and film, folk arts, literature, museum, music, theater and visual arts, and state and local partnerships.

15.3.4 Business Development

The State Department of Economic Development/ Empire State Development (ESD) Corporation is dedicated to creating jobs and encouraging prosperity by strengthening and supporting businesses in New York. The agency maintains regional and international offices to provide one-stop access to the state's products and services for business. It also provides direct services ranging from financial incentives for joint ventures to technical expertise in site selection and development. The agency works in partnership with local governments and regional organizations which desire to attract business.

ESD assists local governments in establishing industrial development agencies. As the State's primary agency in the development of tourism, ESD works with counties and their designees to administer a tourism matching fund program. State funds appropriated for this program by the Legislature are apportioned to support local and regional tourism advertising according to guidelines set by state law.

State-local efforts to help distressed communities achieve economic growth have been intensified under the New York State Economic Development Zones Act, Chapter 686 of the Laws of 1986. Empire State Development administers this program in cooperation with other agencies and participating counties, cities, towns and villages. Nineteen such zones may be designated over the first three years of the program by the State Zone Designation Board, and provided with special incentives to spur economic growth. The incentives offered include assistance with financing and business permits, as well as various tax and local incentives.

15.3.5 Campus and Institutional Housing

The State Dormitory Authority is a public corporation established in 1944 to finance and construct dormitories for state teachers' colleges. Its functions have since been expanded to include design, financing and construction project management services for a wide range of higher education, healthcare and public-purpose facilities. The authority serves the State University of New York; the City University of New York; independent colleges and universities; community colleges; special education schools; court facilities for cities and counties; facilities for the State Departments of Health and Education and for the Offices of Mental Health, Mental Retardation and Developmental Disabilities, and Alcoholism and Substance Abuse Services; the New York City Health and Hospitals Corporation; long-term health care facilities; independent hospitals, primary care facilities, diagnostic and treatment centers, medical research centers; and public-purpose institutions authorized by statute. The Authority is also authorized to provide tax-exempt equipment leasing.

15.3.6 Office of Planning and Development

Administered by the Department of State with federal and state funding, this program guides and coordinates local, state and federal development and preservation decisions for the state's 3,200 miles of coastline. Specific guidance is provided by the program's coastal policies addressing a variety of concerns and issues. Funding through the Environmental Protection Fund and technical assistance are offered to help coastal municipalities

prepare and implement Local Waterfront Revitalization Programs (LWRP). Through local programs, municipalities may refine and supplement state coastal policies to reflect local conditions and needs. Chapter 366 of the Laws of 1986 extended the LWRP concept to inland waterways in the state, including the Barge Canal System and major lakes and rivers.

15.3.7 Community Development Block Grants

The Federal Community Development Act of 1974, as amended, established the Community Development Block Grant (CDBG) Program. The program provides annual grants on a formula basis to eligible metropolitan cities, towns with populations of at least 50, 000, and urban counties. Program funds may be used for housing activities, economic development, public facilities (such as day care centers or health centers), public improvements (such as street improvements), public services (such as social programs for the elderly, youth or abused persons), and planning and administration. Funds must primarily benefit low and moderate-income persons, although grantees may also fund activities which aid in the prevention or elimination of slums or blight or address an urgent community development need.

The U.S. Department of Housing and Urban Development (HUD) also awards annual grants to 48 states and the Commonwealth of Puerto Rico, which in turn award and administer grants to small cities and counties not covered by the regular CDBG eligibility standards. The Department's Buffalo office awards non-entitlement grants annually to small cities and counties in New York.

15.3.8 Parks, Recreation and Historic Preservation

New Yorkers enjoy a rich heritage of parks and historic and cultural resources that contribute to the quality of their communities. Responsibility for developing and carrying through statewide plans for the use of recreational and historical assets rests with the Office of Parks, Recreation and Historic Preservation (OPRHP). OPRHP coordinates state and federal aid for parks, recreation and historic preservation programs. It serves as the state's liaison with the federal government for matters relating to preservation provisions of the Federal Tax Reform Act of 1976 and the National Historic Preservation Act. OPRHP administers three major pass programs allowing discounts in the use of state park and recreational facilities. In cooperation with local education systems, OPRHP operates outdoor learning programs at parks in most regions. It also administers state planning efforts for the Urban Cultural Park Program and sponsors various athletic programs including: the Empire State Games, the Games for the Physically Challenged, and the Senior Games. In addition, OPRHP administers the State Navigation Law and conducts the Marine and Recreational Vehicles program. This effort includes the Law Enforcement Subsidy, the Safety and Education programs and the Marine Services Program. These provide local law enforcement agencies with assistance in the education and training of youths regarding boat and snowmobile safety, in public facilities inspection and in the placement of buoys in the state's inland waterways.

Regional park, recreation and historic preservation commissions advise the OPRHP Commissioner on the promulgation of rules and regulations for park regions to ensure they are consistent with state policies and regulations. The State Council of Parks, Recreation and Historic Preservation aids the Commissioner by reviewing and making recommendations on policy, budget and state aid plans. The Council serves as the central advisory board on all matters affecting parks, recreation and historic preservation. The State Board of Historic Preservation advises the Commissioner and the Council on policy matters affecting historic preservation and the historic sites system and on priorities among historic preservation opportunities. The Board also reviews and makes recommendations to the Commissioner on the nomination of properties to the National or State Registers. At the local level counties, cities, towns and villages have concurrent powers to establish and maintain parks. They may acquire and dedicate land for park and recreational purposes and can utilize zoning powers to plan and set aside land for park purposes to meet the needs of local residents.

15.3.9 Weatherization Assistance

This federally-funded program, administered in New York by DHCR, funds the installation of energy conservation measures to reduce the energy costs of low-income families and individuals. It has been credited with significantly reducing energy costs and increasing the health and comfort of low-income participants. Funding is provided by the U.S. Department of Energy and the U.S. Department of Health and Human Services. Under the Program, DHCR funds local sub-grantees under contract to perform the work. These local sub-grantees, which deliver services on a statewide basis, include community action agencies, community-based organizations, counties, and Indian tribal organizations. Since the program commenced in 1977, over 385,000 dwelling units in the state have been weatherized.

15.4 Public Safety

Protection of life and property is one of the oldest functions of local government. In New York State most of the early municipal incorporations were little more than efforts to provide fire and/or police services to built-up areas. Today, public safety represents the third largest expense of local government. Only education and social services command a larger share of the local dollar.

15.4.1 Correctional Programs

Four state entities share with local governments certain responsibilities for caring for offenders and restoring them to society.

The Department of Correctional Services (DOC) is primarily responsible for the institutional care and confinement of 72, 000 felons housed in 69 correctional facilities across New York State. Its 32, 500 employees provide for the safety and security of the system. DOC's also interacts with communities, sending supervised work crews out into the community for nearly two million hours each to perform public service projects for governments and not-for-profit organizations. Staff is responsible for the operation of an array of academic, vocational, drug treatment and work programs designed to provide all offenders with the basic skills they will need to function as responsible and law-abiding citizens upon their release from custody. The Department also operates a 900-bed drug treatment campus that serves parole violators as well as felons newly-sentenced by the courts to a drug treatment program.

The State Commission of Correction is charged with general oversight responsibility for all prisons, jails and lock-ups throughout the state. This mandate is aimed at improving the administration of correctional facilities, and the conditions which affect the lives and safety of inmates and staff. The Commission consists of three members appointed by the Governor. One member serves as Chairperson, while each of the others serves, respectively, as Chairperson of the Medical Review Board and Chairperson of the Citizens' Policy and Complaint Review Council. The Commission establishes minimum standards for care, custody, treatment, and supervision of all persons confined in State and local correctional facilities. It inspects facilities to ensure adherence to these standards and handles grievances filed with respect to those standards. The Commission's Medical Review Board investigates and issues a report on all in-custody deaths.

The Division of Probation and Correctional Alternatives (DPCA) exercises general supervision over the administration of local probation agencies and in the use of correctional alternative programs. The DPCA promotes and facilitates probation and other community corrections programs through funding and oversight. It administers a program of state aid funding for approved local probation services and for municipalities and private non-profit agencies which have approved alternative-to incarceration service plans that enable localities to maintain inmates in local correctional facilities more efficiently. It also funds designated demonstration and other specialized programs.

The State Director of Probation also adopts rules concerning methods and procedure used in the administration of local probation services, and develops standards for the operation of alternative-to incarceration programs. The State Director also serves as the Chair of the State Probation Commission. The Commission members, appointed by the Governor, provide advice and consultation to the State Director on all matters relating to probation. The State Board of Parole, an administrative body within the Division of Parole, is responsible for the release of certain prisoners in State correctional institutions. The Division is responsible for community protection and offender risk control through the administration of parole services.

15.4.2 Criminal Justice

The Division of Criminal Justice Services (DCJS) seeks to increase the effectiveness and vitality of the criminal justice system in New York State. It's Identification and Criminal History Operation, a data bank of criminal records, gives even the smallest department's access to a massive record system. Through DCJS, local police may also obtain criminal information from the Federal Bureau of Investigation. The Division's Bureau for Municipal Police advises all municipal police agencies in the state.

15.4.3 Emergency Medical Services

Both the public and private sectors provide pre-hospital emergency medical services. In some cities, a single commercial ambulance service provides paramedic-level services. In other cities, the fire department provides paramedic services while commercial ambulance service provides basic life support and transportation services. In small communities and suburban and rural areas, voluntary ambulance services predominate. These voluntary services are under the auspices of fire departments or districts, independent squads or (in a few cases) hospitals. Voluntary services are sometimes supported by fire or special improvement district taxes, but more often rely upon donations from the public and/or fees under contract from local governments. All commercial as well as volunteer ambulance services must now be certified by the State Health Department. To receive certification, ambulance services must meet specific training and equipment requirements and quality assurance mandates.

15.4.4 Fire Protection

Firefighting service in New York State is provided through a variety of municipal and intermunicipal arrangements. About 19,000 full-time career firefighters and over 110,000 volunteer firefighters work in more than 1,800 fire protection/prevention organizations (federal, state, and local) across the state.

In cities and villages, firefighting is commonly provided by a municipal fire department, composed either of career or volunteer firefighters or a combination of the two. In larger communities that utilize volunteers, the local department generally contains several independent fire companies. Each has its own officers, buildings and apparatus. The fire chief is usually appointed by the local chief executive upon nomination by members of the fire company. In instances where a village maintains no fire department, it contracts with a neighboring community or fire district for fire protection services.

Unlike villages and cities, towns are not legally empowered to provide direct firefighting services. Generally, town boards create one or more fire districts or fire protection districts to cover all or part of a town. A few areas have no fire service protection. These arrangements are more fully described in Chapter 7 [69] and Chapter 9 [91]. Although towns do not directly provide firefighting services, they do provide valuable fire protection services. Many larger towns have a fire prevention and inspection staff. Others, particularly those with a large number of fire districts or fire protection districts, provide central dispatching and training facilities.

15.4.4.1 County Role

Counties, guided by their Fire Advisory Boards, provide valuable services for fire protection, including the maintenance of specialized firefighting equipment for departments within their jurisdiction. Most counties have a fire coordinator, who is a key link between state and local activities. Appointed by the county's legislative body under section 225-a, of the County Law, the coordinator has the responsibility of coordinating mutual aid responses by fire departments within the county and of administering education and training programs. To improve fire department response efficiency, many coordinators have developed countywide radio communication systems.

15.4.4.2 State Role

The State does not generally provide fire services directly to the public except at certain State-owned institutions and, in the case of forest fires, where the Division of Forest Protection and Fire Management in the Department of Environmental Conservation coordinates responsibility for fire protection. The State does, however, provide technical assistance to municipalities in arson investigation and hazardous materials control. Otherwise, the State provides direct support to local fire service units through its command function in activating the State Fire Mobilization and Mutual Aid Plan to cope with major disasters. The plan is administered through the Office of Fire Prevention and Control (OFPC) in the Division of Homeland Security and Emergency Services.

Through OFPC, headed by the State Fire Administrator, the State provides training and specialized services to deal with arson and other fire protection issues at all levels of state and local government. The Office makes training available top aid and volunteer firefighters, other government officials, and emergency response personnel, on an in-residence basis at its State Academy of Fire Science in Montour Falls and at the Academy's Camp Smith Annex in Peekskill, as well as on a commuter basis at remote locations across the state.

15.4.4.3 Fire Boards and Commissions

The Fire Safety Advisory Board, a 12-member unpaid body appointed by the Governor, assists the Secretary of State and State Fire Administrator in all aspects of fire protection and legislation. A 15-member Arson Board has been established to advise and assist the Secretary of State and State Fire Administrator on arson problems. The New York State Emergency Services Revolving Loan Board reviews and makes recommendations to the Secretary of State for low-interest loans to municipalities and fire districts that meet specific criteria.

The Fire Fighting and Code Enforcement Personnel Standards and Education Commission recommend training standards to the Governor which establishes minimum qualifications for firefighters and code enforcement personnel. The Commission consists of the Secretary of State, State Fire Administrator, and five members appointed by the Governor with the consent of the Senate.

15.4.4.4 Building Code Administration and Enforcement

The New York State Uniform Fire Prevention and Building Code (Uniform Code), which became effective January 1, 1984, superseded all existing local fire and building codes except in New York City, which has its own code in effect. Municipalities may, however, adopt and enforce more stringent local provisions with State approval.

Except in a minority of localities, administration and enforcement of the Uniform Code are carried out directly by local governments through local laws, and in accordance with minimum standards promulgated by the Secretary of State. Those municipalities must enforce the Code through locally-appointed officers, although support services may be (and often are) contracted out to private organizations. Some municipalities have entered into cooperative agreements under Article 5-G of the General Municipal Law. Such a pooling of resources has been attractive in rural areas. A municipality or a county may choose not to enforce the Uniform Code by enacting a

local law providing that it will “opt out” of enforcement. Responsibility for enforcement is then automatically transferred to the county, or, where the county has “opted out”, to the State.

The Department of State’s Division of Code Enforcement and Administration is charged with administration of the Uniform Code to local governments, state agencies, and the public. Effective July 13, 1996, additional responsibilities were transferred to the Department of State from the Division of Housing and Community Renewal, including interpretation of the Uniform Code, providing staff to the Code Council, a HUD sponsored mobile home oversight and complaint program, approval of modular home construction plans and a third party plant inspection program, issuance of Certificates of Acceptability for construction materials, methods and devices, and other associated functions. Effective January 1, 1999, the Department assumed responsibility for the State Energy Conservation Construction Code.

The Department has eleven regional field service offices providing technical assistance and coordinating variance requests with local government officials. Through its regional field service offices, the Department of State conducts reviews of local code enforcement programs and administers a complaint resolution program. The regional field service offices employ State code enforcement officers in municipalities or counties where the State has code enforcement responsibility. Municipalities and counties may regain their local enforcement authority by repealing their opt-out enactment. The Secretary of State is also empowered to investigate local administration and enforcement of the code and take remedial actions as warranted.

Responsibility for formulating and amending the Uniform Code rests with the State Fire Prevention and Building Code Council, a 17-member body chaired by the Secretary of State, and composed of the State Fire Administrator, Commissioner of Health, Commissioner of Labor and 13 members appointed by the Governor (seven with the consent of the Senate).

The Department of State’s Educational Services Unit provides a statewide code enforcement training program, having as its priority the basic training and continuing education of code enforcement officers. The Department’s services are available to elected and appointed officials, the general public, contractors, architects, engineers, and manufacturers.

15.4.5 Emergency Management

An integrated emergency management system is the legal responsibility of the State and local governments, pursuant to Article 2-B of the Executive law and the New York State Defense Emergency Act.

The State Role The State Disaster Preparedness Commission, through the New York State Emergency Management Office (SEMO), is responsible for coordinating and implementing emergency management programs, financial assistance and work plans at the state and local levels of government. This includes provision for hazard identification and analysis, coordination and conduct of emergency and disaster management training programs, comprehensive emergency management planning, and statewide communications and warning systems.

The Local Role The responsibility for disaster preparedness rests with the chief executive of each county, city, town and village. Every county and city should develop comprehensive emergency management plans. In the event of a disaster or emergency, the local chief executive may declare a local state of emergency, which permits the use of wide-ranging emergency powers as long as the procedures governing their declaration are followed. A local chief executive may also request that the Governor declare a state disaster emergency, which would result in implementation of the State Comprehensive Emergency Management Plan to support county response and recovery operations. Before such a request is made, all county resources must be fully involved with the disaster and considered insufficient to cope with it. Cities, towns and villages should first request aid from their counties before approaching the State.

15.4.6 Police Services

Over 400 separate county, city, town and village police agencies share responsibility for the enforcement of state and local laws in New York. These range in size from New York City's Department, with over 37,000 sworn officers, to 11 agencies with only one or two part-time police officers. Communities in New York State employ over 55,000 full-time and over 1,800 part-time municipal police personnel at a cost of almost five billion dollars annually.

State Police The New York State Police was established by Executive Law on April 11, 1917. Its goal at that time was, and continues to be, to provide effective, cost-efficient police service to the people of New York State. Its members strive to preserve peace, enforce laws, protect life and property, detect and protect against crime and arrest violators.

For the purpose of administration, the state is divided into eleven geographical areas (Troops), each of which is further divided into zones, stations and satellite offices. Special detail offices are located in many cities. The Uniform Trooper is the field officer who most frequently comes into direct contact with the citizens. State Troopers work closely with the Division's Bureau of Criminal Investigation (BCI) as well as other state, county, local and federal law enforcement agencies. A number of specialized support groups also operate within the State Police. In many areas, State Police have the primary responsibility for law enforcement, as many municipalities have only small or no police forces. Even communities with a full-time police agency must frequently call upon the BCI to provide investigative and technical expertise which is lacking in many small departments. The State Police Laboratory often provides its services to larger departments.

15.5 Environmental Protection

15.5.1 Conservation Councils,Commissions and Boards

Volunteer environmental management councils (EMCs) support county governments through environmental analysis at the state level. Volunteer citizen advisory commissions (CACs) perform a similar function at the town, village and municipal level. The New York State Conservation Fund Advisory Board (CFAB), makes recommendations to state agencies on state government plans, policies, and programs that specifically affect fish and wildlife.

15.5.2 Flood Control, Water Resources and Wastewater Programs

DEC assists localities with their efforts to mitigate flooding, helps obtain funds for flood-control measures, coordinates the National Flood Insurance Program, and works with SEMO to assist communities in preparing for flood emergencies. DEC also helps local governments develop small projects for watershed protection, and assists them in planning and implementing strategies for protecting, developing and using local water. DEC issues general wastewater and storm water permits and, with partners, identifies funding sources for sustainable wastewater infrastructure programs. DEC also enforces standards for sewage treatment, and tests and certifies operators for municipal wastewater treatment plants.

15.5.3 Environmental Facilities

The Environmental Facilities Corporation (EFC) is a public benefit corporation that promotes environmental quality by providing low-cost capital and expert technical assistance to municipalities, businesses and state agencies for environmental projects throughout New York State. Its purpose is to help public and private entities comply with federal and state environmental requirements.

EFC oversees several major programs designed to promote environmental quality at an affordable cost. The EFC currently has two Revolving Loan Funds. The Clean Water State Revolving Loan Fund is used to make low-interest loans to municipalities to help pay for water pollution control facilities, such as wastewater treatment plants, and for water quality remediation measures associated with landfill closures. The Drinking Water State Revolving Loan Fund is operated jointly by the EFC and the Department of Health to provide low-interest loans to public and private water systems to undertake needed drinking water infrastructure improvements. Grants are available for drinking water projects in communities facing financial hardship.

The Technical Advisory Services program helps business and government understand and comply with state environmental requirements, and provides services for protecting the New York City Watershed and helping small businesses comply with air pollution standards. The Industrial Finance Program provides low-cost loans to private entities seeking to borrow for capital facilities that deal with solid waste, sewage treatment, drinking water, limited hazardous waste disposal and site remediation. The Financial Assistance to Business program helps businesses comply with air and water quality environmental regulations and provides grants to small businesses for specific pollution control or prevention projects.

15.5.4 Forest Resources

15.5.5 Programs

DEC gathers, analyzes and reports on tree pest and disease information for private and public forest landowners and managers. It places the highest priority on early detection and rapid response to high-impact invasive species that threaten forests. For private forest management, DEC foresters provide expert advice and technical assistance on managing timber products, improving wildlife habitat, controlling erosion, planting trees, enhancing recreation and managing sugar bushes.

15.5.6 Air Resources Programs

DEC's Division of Air Resources (DAR) works to improve and maintain air quality throughout New York. It collaborates with academic institutions on various air pollution research projects, and is actively involved with national and regional air pollution/air quality management associations.

15.5.7 Marine Resources Programs

Both salt and freshwater estuaries and ocean coastal waters, where marine species live, feed and reproduce, are managed by DEC's Division of Marine Resources (DMR) and Hudson River Estuary Program (HREP). Other state, local and federal agencies, the scientific community, and private citizens work cooperatively with DEC in managing New York's Marine District.

15.5.8 Plant and Animal Protection

Among DEC's main responsibilities is to manage and protect New York State's wild animal and plant populations. To do this, DEC conserves crucial habitats and establishes and enforces regulations and policies to support plants and animals.

15.5.9 Climate Smart Communities Program

DEC's Office of Climate Change (OCC) was created to build a climate resilient future for the state by working to reduce atmospheric greenhouse gases (GHGs) and developing market-based solutions to climate-change. OCC works with local governments through its Climate Smart Communities Program, a network of New York State communities engaged in reducing GHG emissions, improving climate resilience, and adapting to changing climate.

15.5.10 Oil and Chemical Spill Response Program

About 16,000 oil and chemical spills are reported to DEC annually and about 90 percent involve petroleum products. Before staff from DEC's Spill Response Program take action, they assess spill content, potential environmental damage, and any threats to public safety.

15.5.11 SEQRA Assistance Services

New York's Environmental Quality Review Act (SEQRA) requires all state and local government agencies to assess environmental impacts equally with social and economic factors during discretionary decision-making on proposed activities and projects. DEC is charged with issuing regulations regarding the SEQR process, and may provide technical assistance when needed.

15.5.12 Waste Management and Recycling Program

DEC provides technical and regulatory assistance to communities regarding waste management. In addition, the agency uses inspections to assess the operational compliance of solid waste management facilities (SWMF). DEC's Hazardous Waste Management Program helps prevent and manage the generation of industrial hazardous wastes. DEC issues permits, conducts inspections, signs consent orders, and gathers and processes data. DEC administers state assistance grants for waste reduction, recycling and household hazardous waste (HHW) programs. Funding is provided on a 50% reimbursement rate for eligible costs.

15.5.13 Water and Wastewater Services

Water and sewerage services have long been available in urbanized areas and are also available in many suburban areas. The extension of these facilities has a major impact on the extent direction of development.

Localities utilize several kinds of organizational mechanisms to provide sewage and water services. The most prevalent are the municipal water or sewer departments in cities and villages and the water or sewer districts in towns. Most cities and many villages have developed their own sources of water supply and have constructed sewage treatment plants. While some town districts have developed these capital facilities, many purchase the services from adjoining localities. Town districts frequently purchase water or sewage treatment services as a part of a growing regionalization of water and sewage services. In the sewage area, state and federal grant requirements often dictate intermunicipal action. County sewer districts frequently provide major capital facilities for a multi-municipal sewage treatment project. These county districts and other intermunicipal arrangements allow the use of sophisticated techniques, often at considerably lower unit costs than a number of smaller, independent facilities could obtain.

In addition to county districts, local governments have occasionally established authorities to provide water or sewage service over a wide area. An example is the Monroe County Water Authority, which serves a large area around the city of Rochester.

In some areas the private sector plays a large role in the delivery of water and sewage service. Even in an urban area such as New York City, the Borough of Queens is served by a private water company. In a number of suburban developments, the developer often creates small water or sewage companies. Towns or villages control the rates private companies charge for sewage service. The State Public Service Commission regulates the price private water firms charge for their services.

The State plays a role in the regulation of municipal water and sewer agencies. The Department of Health enforces water supply standards and the Department of Environmental Conservation enforces sewage treatment standards. Both departments, through their use of aid programs, strongly encourage an intermunicipal approach to water and sewage services.

15.6 Transportation

15.6.1 Aviation

Many counties, cities, towns and villages in New York State own and operate airports that provide a variety of air services to their communities. The Department of Transportation (DOT) coordinates the state's overall aviation improvement program with local communities. In addition to providing state funds for capital improvements for local airports and aviation facilities, DOT provides guidance and assistance to local communities in obtaining federal aid for airport improvements.

15.6.2 Mass Transit

DOT is concerned with the provision of local, regional and intercity public transportation at reasonable cost, while conserving energy and attending to the needs of such groups as commuters, the elderly, young people, the needy and the disabled. DOT's role in local public mass transit activities encompasses short-range mass transit planning, as well as the provision of state aid for capital and operating costs to local governments and other entities operating local transit service.

15.6.3 Railroads

DOT has general statutory authority over all railroads, except the Metropolitan Transportation Authority. The DOT Commissioner is empowered to examine railroad facilities and operations and to order compliance with the Railroad Law. The Railroad Law allows municipalities which have jurisdiction over a highway to petition the DOT Commissioner for the replacement or reconstruction of an existing bridge that separates a non-state public highway and a railroad. If DOT determines that the bridge should be replaced or reconstructed, plans are developed and a contract prepared, with costs shared on a percentage basis. The Transportation Law permits the governing body of any municipality in which a highway-railroad at-grade crossing is located to petition the DOT Commissioner to institute procedures for the elimination of the crossing at grade. If DOT determines that the crossing should be eliminated, plans are prepared and a contract is let, with the State bearing all costs. Localities may apply to DOT for funding from the federal Active Grade Crossing Improvement Program. This program identifies projects for grade-crossing safety improvements, including the installation of flashing lights, protective gates and smoother, more reliable crossing surfaces. Since 1974 over 500 grade-crossing sites in need of improvement have been identified, and approximately half have been improved. DOT administers capital programs for rail improvements and oversees intercity passenger service provided by Amtrak.

15.6.4 State Programs

As of the printing of this publication, the state transportation network includes: a state and local highway system which annually handles over 100 billion vehicle miles, encompassing over 110,000 miles and 17,000 bridges; a 5,000-mile rail network over which 42 million tons of equipment, raw materials, manufactured goods and produce are shipped each year; a 524-mile canal system; 484 public and private aviation facilities through which more than 31 million people travel each year; five major ports, which annually handle 50 million tons of freight; and over 130 public transit operators, serving over 5.2 million passengers each day.

DOT focuses on the state's growing transportation needs and is responsible for developing and coordinating statewide transportation policy. To carry out that responsibility, DOT develops strategic transportation plans to enhance the state's economy, preserve the transportation infrastructure and ensure basic personal mobility for New Yorkers. It coordinates this planning activity with those of federal, state and local entities and other organizations.

DOT coordinates and helps develop and operate transportation facilities and services, and plans for the development of commuter and general transportation facilities. It also administers public safety and regulatory programs for rail and motor carriers in intrastate commerce, and oversees the safe operation of bus lines and commuter rail and subway systems which are subsidized with state funds.

DOT certifies municipal applications for the State funding of local highway improvements under the Consolidated Local Street and Highway Improvement Program (CHIPS), and coordinates with Metropolitan Planning Organizations (MPOs) to administer the Federally-funded Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy for Users (SAFETEA-LU). There are currently 13 MPOs across the state. Each is responsible for developing, in cooperation with the State and affected transit operators, a long-range transportation plan and a Transportation Improvement Program (TIP) for its area.

15.6.5 Streets and Highways

The State has responsibility for the state and interstate highway systems. It does not, however, maintain those portions of state highways within cities. Within towns, state highways are a State responsibility, although counties and towns may provide snow and ice control under contract.

County governments maintain a county road system that is designated by the county's legislative body. Like the State, counties do not maintain roadways within cities. The degree to which counties actually perform maintenance on the county road system varies. Some counties maintain large and well-equipped maintenance organizations and perform most of the needed work. Others maintain only a small work force and contract with towns for much of the maintenance.

15.6.6 State Canals

The New York State Canal System serves the people of the state in many ways: as a means for transportation, a water source for industry and agriculture, a source of hydroelectric power, an outdoor recreation resource and as a water control mechanism for much of New York. The New York State Canal Corporation within the State Thruway Authority operates and maintains the 524-mile system, which consists of the Champlain, Erie, Oswego and Cayuga/Seneca Canals. The Corporation is implementing a $32.3 million, five-year Canal Revitalization Program to help develop the recreational potential of the System. The Department of Transportation assists public ports, and works with the Council of Upstate Ports of New York to ensure adequate port facilities for shippers and consignees.

15.7 Consumer Protection Services

New York State and its local governments work together to protect consumers from questionable or illegal practices in certain business and occupations. Many state agencies which have regulatory responsibilities operate consumer protection programs to assist citizens and local officials. Coordination for consumer protection at the state level is provided by the Division of Consumer Protection. At the local level, many counties and some cities, towns and villages have established agencies for consumer protection. These local agencies look to the Division of Consumer Protection for support. The Division is empowered to conduct investigations, receive and refer consumer complaints, intervene in proceedings before the Public Service Commission and other agencies, and coordinate the consumer protection activities of state agencies. In addition, the Division recommends new legislation for consumer protection, initiates and encourages consumer protection programs, conducts outreach activities, surveys significant consumer issues and distributes publications on consumer matters including the New York State Consumer Law Help Manual.

Among state agencies' consumer protection programs are the following: The Department of Agriculture and Markets, in cooperation with county and city officials, enforces the law relating to weights and measures. In 1995 the Public Service Commission (PSC) took over regulatory authority of cable television from the former Cable TV Commission. The PSC responds to complaints by cable television consumers, and provides information and technical assistance to local officials concerning cable television franchise questions. Cities, towns and villages have the responsibility of granting franchises to cable television companies and monitoring their operations, but PSC sets standards and provides assistance to local franchising authorities. PSC also regulates other modes of communications as well as electric, gas and water utilities. It operates a consumer outreach and education program, and responds to consumer complaints concerning the regulated entities.

The State Board of Regents and State Education Department license and/or regulate practitioners in a number of professions, including architecture, dentistry, engineering, land surveying, medicine, nursing, occupational therapy, optometry, pharmacy, physical therapy, psychology, public accountancy, social work, speech pathology and veterinary medicine. Regulation is carried out through the Office of Professional Discipline and the respective licensing boards. Regulation of physicians and their assistants is carried out jointly with the State Health Department.

The Department of Health regulates the delivery of health care by institutions and individual providers, and responds to consumer complaints. Its Professional Medical Conduct Unit investigates complaints about physicians and their assistants. The Department of Financial Services licenses and regulates insurers, agents, brokers, bail bondsmen, adjusters and others. Its Consumer Services Bureau responds to consumer questions and complaints. The Office of the Attorney General offers, through its Consumer Frauds and Protection Bureau, help for consumers in the form of public education and mediation, as well as legal action in cases of repeated fraud. The Attorney General prosecutes criminal violations by licensed or registered professionals, fraudulent sales of stocks and securities, frauds against consumers, and monopolies in restraint of trade. Major charities which solicit in the state are registered by the Attorney General's Charities Bureau.

The Department of State licenses and/or regulates certain nonprofessional businesses and occupations. Its Division of Licensing Services regulates armored car carriers and guards, barbers, estheticians, natural hair stylists, cosmetologists, waxing practitioners, nail specialists, bedding manufacturers, coin processors, hearing aid dispensers and dealers, notaries public, private investigators, watch, guard and patrol agencies, real estate brokers and salespersons, and apartment information vendors. Nonsectarian cemeteries as well as pet cemeteries are regulated by its Division of Cemeteries.

15.8 Labor and Working Conditions

The Department of Labor ensures the safety and health of all public and many private employees in the workplace, and administers unemployment assistance. The Department also serves as the principal source of labor market information in the state, including current and predicted economic trends affecting the state's economy. The Department also enforces state labor laws and federal laws relating to working conditions and compensation.

The Division of Employment Services administers job placement assistance, skill assessment and career counseling services. Local and state agencies and not-for-profit organizations are encouraged by the Division to co-locate and coordinate services provided by on-site staff assistance to customers. The Unemployment Insurance Division provides unemployment insurance benefits funded by a tax paid by employers.

The Department administers the worker-protection provisions of the State Labor Law. The Labor Standards Division administers the provisions of the Labor Law concerning minimum wage, hours of work, child labor, payment of wages and wage supplements, industrial homework, farm labor and the apparel industry. The Division of Safety and Health enforces occupational safety and health standards for employees of the state and local governments. The Bureau of Public Work enforces the payment of prevailing wages and supplements on public construction projects and building service contracts. The Welfare-to-Work Division oversees state and local programs under the Temporary Assistance for Needy Families program (TANF), the Food Stamp Employment and Training Program (FEST), the Welfare-to-Work Block Grant program and the Safety Net program. Oversight includes policy development, technical assistance to local social services districts and provider agencies, contract reporting and monitoring, program oversight of state level programs and supervision of local social services districts. The Workforce Development and Training Division administer federal and state funds for programs that offer employment and training services to youth and adults.

15.9 Other Services

State-local partnerships are also involved in the following services and programs areas:

The Office of Advocate for the Disabled works with local governments to ensure that the state's estimated 2.5 million disabled citizens have access to public services and equal opportunity. The Office, established by Executive Order and given a legislative base by Chapter 718 of the Laws of 1982, provides technical assistance and information to help local governments, service providers and others integrate disabled residents into all facets of community life. The Office also keeps the Governor, Legislature and agencies informed about the needs of the disabled; promotes cooperative efforts to develop employment opportunities; helps develop innovative strategies to meet special needs; and operates an information and referral service.

Local governments control dogs pursuant to a combination of state and local laws and in accordance with regulations of the Department of Agriculture and Markets, which maintains a master list of licensed dogs. The Department also promulgates and maintains a uniform code of weights and measures for use in commerce throughout the state. Counties, cities, towns and villages are authorized to establish commissions on human rights, and many have done so. They work closely with the State Division of Human Rights in eliminating and preventing discrimination based on race, creed, color, national origin, sex, age, disability, marital status, or arrest and/or conviction record; in credit transactions, employment, housing and public accommodations.

The New York State Energy Research and Development Authority (NYSERDA) develops innovative energy-efficient technologies to help enhance environmental quality. The Authority assists businesses, residents, municipalities and institutions to be more energy-efficient by investing funds into cost effective energy efficiency deployment strategies, renewable energy sources and clean-fuel technologies.

The State Department of Motor Vehicles (DMV) shares responsibility with county clerks for the issuance of drivers' licenses and registration of motor vehicles. Under the Vehicle and Traffic Law, cities, towns and villages are re-

quired to issue handicapped parking permits to eligible individuals. The DMV also registers and regulates motor vehicle repair shops. Its Division of Vehicle Safety Services responds to consumer complaints.

Chapter 16

Land Use Planning and Regulation

One of the most powerful tools in the local government arsenal is the power to regulate the physical development of the municipality. This power is exercised through a variety of available authorizations and regulatory mechanisms. Through control of land use and development, each municipality is able to develop and display the most desirable physical features of the community.

16.1 The Police Power

Police power is the power government has to provide for public order, peace, health, safety, morals and general welfare. It resides in the sovereign state, but may be delegated by the State to its municipalities. Land use controls are an exercise of the police power long recognized by the United States Supreme Court. In New York, the power to control land use is granted to each municipal government by reference in Article IX, section 2, of the State Constitution and by the various state enabling statutes.

With few exceptions, the exercise of the police power to control land use is a city, town or village function in New York State. This includes the decision whether to control land use, and, if so, to determine the nature of the controls. When exercised, the power to control land use is governed by the state enabling statutes which have granted the power to local governments:..the General City Law, the Town Law, the Village Law, the General Municipal Law, the Municipal Home Rule Law and its companion Statute of Local Governments.

16.2 The Planning Board

The local legislative bodies of cities, towns and villages may create planning boards in a manner provided for by state statute or municipal charter, and may grant various powers to the planning board (General City Law section 27; Town Law section 271; Village Law section 7-718). The statutes authorize municipal legislative bodies to provide for the referral of any municipal matter to the planning board for its review and report prior to final action. While the functions of a planning board may extend beyond land use, in most municipalities the planning board performs primarily a land use control function. Many local zoning laws or ordinances establish a procedure for referral to the local planning board of all applications for rezoning, variances and special use permits. Such planning board reports and recommendations are often of vital importance in deciding these matters. In addition, the local planning board can have an advisory role in preparing and amending comprehensive plans, zoning regulations, official maps, long-range capital programs, special purpose controls and compliance with the State Environmental Quality Review Act (SEQRA). Further, the local legislative body may grant the planning board such regulatory functions as control of land subdivision, site plan review and issuance of special use permits. Where these and

related functions are effectively administered, the local planning board can do much to advance the land use and development policies of the local legislative body.

16.3 Comprehensive Planning

Comprehensive planning may be performed by all municipalities, whether or not it results in a set of land use controls. Comprehensive planning logically forms the basis of all efforts by the community to guide the development of its governmental structure as well as its natural and built environment. Nonetheless, the most significant feature of comprehensive planning in most communities is its foundation for land use controls. Most successful planning efforts begin with a survey of existing conditions and a determination of the municipality's vision for the future. This process should not be confused with zoning or other land use regulatory tools. Instead, the comprehensive plan should be thought of as a blueprint on which zoning and other land use regulations are based.

The state statutes define a comprehensive plan as "the materials, written and/or graphic, including but not limited to maps, charts, studies, resolutions, reports and other descriptive material that identify the goals, objectives, principles, guidelines, policies, standards, devices and instruments for the immediate and long-range protection, enhancement, growth and development" of the municipality (General City Law section 28a(3)(a); Town Law section 272-a(2)(a); Village Law section 7-722(2)(a)). While the use of the state comprehensive plan statutes is optional, they can guide boards through the comprehensive plan process (General City Law section 28-a; Town Law section 272-a; Village Law section 7-722). An important component of the process is public participation. Under the statutes, this occurs both formally, through mandatory hearings held by the preparing board and by the legislative body prior to adoption of the plan, and informally, through the participation of the public at workshops and informational sessions.

Municipalities that do not have professional planners on staff to assist in the preparation of a comprehensive plan have several resources available to them. They may be able to receive assistance from their county or regional planning agency. They may also be able to contract with a professional planning or engineering firm which provides planning services. Also, municipal residents may possess expertise in planning or other environmental or design disciplines. However long or detailed the plan is, its real value is in how it is used and implemented. Since each municipality that has the power to regulate land use has a different set of constraints and options, the final form of each comprehensive plan will be unique. The size and format of the comprehensive plan will vary from municipality to municipality (and possibly from consultant to consultant). It may consist of a few pages, or it may be a thick volume of information.

16.4 County Planning

New York's counties have the statutory power to create planning boards (General Municipal Law section 239-c). The county legislative body may prepare a county comprehensive plan or delegate its preparation to the county planning board or to a "special board" (General Municipal Law section 239-d). Prior to adopting or amending a county official map, the county legislative body must refer the proposed changes to the county planning board and other municipal bodies (General Municipal Law section 239-e). In addition, the county legislative body may authorize the county planning board to review certain planning and zoning actions, including certain subdivision plats, by municipalities within the county (General Municipal Law section 239-c(3)).

State laws require that any city, town or village located in a county possessing a "county planning agency" or "regional planning council" must refer to that agency certain zoning matters before taking final action on those matters. In addition, where authorized by the county legislative body, certain subdivision plats must be referred to the county by the town, village or city planning board before taking final action. Generally, referral must be made where a proposed zoning matter or subdivision plat affects real property within 500 feet of one or more

enumerated geographic features, such as a municipal boundary. Referral to the county planning agency or regional planning council is an important aid to the local planning and zoning process. It provides local planning and zoning bodies with advice and assistance from professional county and regional staff and can result in better coordination of zoning actions among municipalities by inter-jecting inter-community considerations. In addition, it allows other planning agencies (county, regional and state) to better orient studies and proposals for solving local as well as county and regional needs.

16.5 Zoning and Related Regulatory Controls

16.5.1 Zoning

Zoning regulates the use of land, the density of land use, and the siting of development. Zoning is a land use technique that operates prospectively to help implement a municipality's comprehensive plan. It is the most commonly and extensively used local technique for regulating use of land as a means of accomplishing municipal goals. According to a 2008 survey by the Legislative Commission on Rural Resources, 100 percent of cities, 71 percent of towns and 89 percent of villages in New York had adopted zoning laws or ordinances.

Zoning commonly consists of two components: a zoning map and a set of zoning regulations. The zoning map divides a municipality into various land use districts, such as residential, commercial, or industrial. The land use districts that a municipality establishes can be even more specific, such as high, medium and low density residential, neighborhood commercial, central business district, or highway commercial, light industrial, heavy industrial, or agriculture. Mixed-use districts may also be appropriate, depending upon local planning and development goals as set forth in a comprehensive plan. Zoning regulations commonly describe the permissible land uses in each of the various zoning districts identified on the zoning map. They also include dimensional standards for each district, such as the height of buildings, minimum distances (setbacks) from buildings to property lines, and the density of development. These are referred to as "area" standards, as opposed to "use" standards. Zoning regulations will also set forth the steps necessary for approval by the type of use, the zoning district involved, or by both. For example, a single-family home is often permitted "as-of-right" in a low-density residential zoning district. "As-of-right" uses, if they meet the dimensional standards, require no further zoning approvals, and need only a building or zoning permit in order for construction to begin.

16.5.2 The Zoning Board of Appeals

Zoning boards of appeal (ZBAs) are an essential part of zoning administration. The state zoning enabling statutes prescribe that zoning boards of appeals must be created when a municipality enacts zoning (General City Law section 81; Town Law section 267; Village Law section 7-712). ZBAs serve as "safety valves" in order to provide relief, in appropriate circumstances, from overly restrictive zoning provisions. In this capacity, they function as appellate entities, with their powers derived directly from state law. In addition to their inherent appellate jurisdiction, municipal legislative bodies may give ZBAs "original" jurisdiction over other specified matters, such as special use permits and site plan reviews.

By state law, the ZBA must serve to provide for relief from the strict application of regulations that may affect the economic viability of a particular parcel or that may obstruct reasonable dimensional expansion. The state statutes give two varieties of appellate jurisdiction to ZBAs. An appeal seeking an interpretation of provisions of the zoning regulations is an appeal claiming that the decision of the administrative official charged with zoning enforcement is incorrect. It is a claim that the zoning enforcement officer misapplied the zoning map or regulations, or wrongly issued or denied a permit. By contrast, in an appeal for a variance, there is no dispute over the enforcement officer's application of zoning provisions. Instead, the applicant feels there should be an exception made in his or her case, and that some of the zoning rules should not apply in a particular circumstance. A ZBA must then apply the criteria set forth in the state statutes in determining whether to grant the requested variance.

Board of appeals members are appointed by the municipality's legislative body in a manner provided for by state statute or municipal charter. ZBAs function free of any oversight by the municipal legislative body. Where the zoning board of appeals has final decision-making authority, the legislative body may not review the grant or denial of variances, special use permits, or any other decisions; the statutes provide for review of ZBA decisions by the state courts in Article 78 proceedings.

For more information on the zoning board of appeals, please see the New York Department of State publication "Zoning Board of Appeals" at https://www.dos.ny.gov/lg/publications/Zoning_Board_of_Appeals.pdf.

16.5.3 Related Controls

In some communities, the basic use and density separation provided by traditional zoning is all that is necessary to achieve municipal development goals and objectives. Many communities desire, however, development patterns which may be only partially achieved through basic zoning. For example, a municipality may wish to strongly encourage a particular type of development in a certain area, or may wish to limit new development to infrastructure capacity. There are other land-use regulatory techniques available to address those objectives. Use of one or more particular techniques can serve to encourage and "market" the type of development and growth a municipality desires, more closely linking a municipality's comprehensive plan with the means to achieve it. Six of these techniques (special use permits, site plan review, subdivision review cluster, incentive zoning, and transfer of development rights) are provided for in the enabling statutes and briefly discussed below.

16.5.4 Special Use Permits

In most municipal zoning regulations, many uses are permitted within a zoning district as-of-right, with no discretionary review of the proposed project. On the other hand, municipalities may require a closer examination of certain designated uses. The special use permit zoning technique (sometimes referred to as conditional uses, special permits or special exceptions) allows a board discretionary authority to review a proposed development project in order to assure that it is in harmony with the zoning and will not adversely affect the neighborhood. A special use permit is applied for and granted by the reviewing board if the proposal meets the special use permit standards found in the zoning regulations. Typically, the standards are designed to avoid possible negative impacts of the proposed project with adjoining land uses or with other municipal development concerns or objectives, such as traffic impacts, noise, lighting, or landscaping. State statutes prescribe the procedure for all special use permit applications.

16.5.5 Site Plan Review

Site plan review is concerned with how a particular parcel is developed. A site plan shows the arrangement, layout and design of the proposed use of a single parcel of land. Site plan review can include both small and large-scale proposals, ranging from gas stations, drive-through facilities and small office buildings, to shopping centers, apartment complexes, and industrial parks. Site plan review can be used as a regulatory procedure standing alone, but is also often required in connection with other needed zoning approvals such as special use permits. The authority to require site plan review is derived from the state enabling statutes (General City Law section 27-a; Town Law section 274-a; Village Law section 7-725-a). A local site plan review requirement may be incorporated into the zoning law or ordinance, or may be adopted as a set of separate regulations. As in the case of special use permits, the local legislative body has the power to delegate site plan review to the planning board, zoning board of appeals, or another board. Alternatively, the legislative body may retain the power to exercise such reviews.

The local site plan review regulations or local zoning regulations determine what uses require site plan approval. Uses subject to review may be (1) identified by the zoning district in which they are proposed; (2) identified by

use, regardless of the zoning district or proposed location within the community; or (3) located in areas identified as needing specialized design restrictions by way of an overlay zone approach, such as a flood zone or historic district.

Site plan issues should be addressed through a set of general or specific requirements included in the local site plan review regulations. As an alternative to the installation of required infrastructure and improvements, the site plan statute allows a municipality to require the applicant to post a performance guarantee to cover their cost.

16.5.6 Subdivision Review

There is probably no form of land use activity that has as much potential impact upon a municipality as the subdivision of land. The subdivision process controls the manner by which land is divided into smaller parcels. While a subdivision is typically thought of as the division of land into separate building lots that are sold to individual buyers, subdivision provisions may also apply to a simple division of land offered as a gift or which changes lot lines for some other reason. Subdivision regulations should ensure that when development does occur, streets, lots, open space and infrastructure are properly and safely designed, and the municipality's land use objectives are met.

Planning boards, when authorized by local governing bodies, may conduct subdivision plat review. A "plat" is a map prepared by a professional that shows the layout of lots, roads, driveways, details of water and sewer facilities, and, ideally, much other useful information regarding the development of a tract of land into smaller parcels or sites. The state enabling statutes contain specific procedures for the review of both preliminary and final plats (General City Law sections 32, 33; Town Law sections 276, 277; Village Law sections 7-728, 7-730). Most municipalities use the two-step (preliminary and final plat) process.

Subdivision review is a critical tool in a municipality's land use management scheme and has important consequences for overall municipal development. The subdivision of large tracts may induce other related development in the neighborhood, produce demands for rezoning of neighboring land, or trigger the need for additional municipal infrastructure.

For more information about subdivision review and procedure, please see the New York Department of State publication "Subdivision Review in New York State" at https://www.dos.ny.gov/lg/publications/Subdivision_Review_in_NYS.p

16.5.7 Cluster Development

Cluster development is a technique that allows flexibility in the design and subdivision of land (General City Law section 37; Town Law section 278; Village Law section 7-738). By clustering a new subdivision, certain community planning objectives can be achieved. The use of cluster development can greatly enhance a municipality's ability to maintain its traditional physical character while at the same time providing (and encouraging) new development. It also allows a municipality to achieve planning goals that may call for protection of open space, scenic views, agricultural lands, woodlands and other open landscapes, and may limit encroachment of development in, and adjacent to, environmentally sensitive areas. Cluster development is also attractive to developers because it can result in reduced development expenses relating to roadways, sewer lines, and other infrastructure, as well as lower costs to maintain that infrastructure.

When it is used according to the enabling statutes, cluster development is a variation of conventional subdivision plat approval. Cluster development concentrates the overall maximum density allowed on property onto the most appropriate portion of the property for development. The maximum number of units allowed on the parcel is no greater than would be allowed under a conventional subdivision layout for the same parcel.

16.5.8 Incentive Zoning (Bonus Zoning)

The authority to incorporate incentive zoning into a municipality's zoning regulations is set forth in the state planning and zoning enabling statutes (General City Law section 81-d; Town Law section 261-b; Village Law section 7-703). Incentive zoning is an innovative and flexible technique that can be used to encourage desired types of development in targeted locations. Conceptually, incentive zoning allows developers to exceed the dimensional, density, or other limitations of zoning regulations in return for providing certain benefits or amenities to the municipality. A classic example of incentive zoning would be an authorization to exceed height limits by a specified amount, in exchange for the provision of public open space, such as a plaza.

If a municipality desires a certain type of development in particular locations, it can usually only wait to see if a developer will find it economical to build. Incentive zoning changes this dynamic by providing economic incentives for development that otherwise may not occur. Incentive zoning is also a method for a municipality to obtain needed public benefits or amenities in certain zoning districts through the development process. Local incentive zoning laws can even be structured to require cash contributions from developers in lieu of physical amenities, under certain circumstances.

16.5.9 Transfer of Development Rights (TDR)

Transfer of Development Rights (TDR) is a complex growth management technique. It is based on the real property concept that ownership of land gives the owner a "bundle of rights," each of which may be separated from the rest. For example, one of these rights is the right to develop land. With a TDR system, landowners are able to retain their land, but sell the development rights for use on other properties.

Under the state zoning enabling statutes (General City Law section 20-f; Town Law section 261-a; Village Law section 7-701), areas of the municipality that have been identified through the planning process as in need of preservation (e.g., agricultural land) or areas where development should be avoided (e.g., municipal drinking water supply protection areas) are established as "sending districts." Development of land in such districts may be heavily restricted, but owners are granted rights under the TDR regulations to sell the rights to develop their lands. Those development rights may thereby be transferred to lands located in designated "receiving districts."

Transferable development rights usually take the form of a number of units per acre, or gross square footage of floor space, or an increase in height. The rights are used to increase the density of development in a receiving district. Receiving districts are established after the municipality has determined that they are appropriate for increased density, based upon a study of the effects of increased density in such areas. Such a study is best incorporated within the municipality's comprehensive plan.

The state zoning enabling statutes require that lands from which development rights are transferred are subject to a conservation easement, limiting the future development of the property. The statutes also require that the assessed valuation of properties be adjusted to reflect the change in development potential for real property tax purposes. For more on transfer of development of rights and their application, please see the New York Department of State publication "Transfer of Development Rights" at https://www.dos.ny.gov/lg/publications/-Transfer_of_Development_Rights.pdf.

16.6 Other Land Use Controls

In addition to the six techniques described above, four others are often employed: overlay zoning, performance zoning, and floating zones and planned unit development. They are not treated specifically in the enabling statutes, but have been considered to be lawful within the general statutory grants of zoning power.

16.6.1 Overlay Zoning

The overlay zoning technique is a modification of the system of conventionally-mapped zoning districts. An overlay zone applies a common set of standards to a designated area that may cut across several different conventional or "underlying" zoning districts. The standards of the overlay zone apply in addition to those of the underlying zoning district. Some common examples of overlay zones are the flood zones administered by many communities under the National Flood Insurance Program, historic district overlay zones, areas of very severe slopes, waterfront zones and environmentally sensitive areas. The state enabling statutes do not contain provisions dealing with overlay zoning, but it is employed most often in conjunction with special use permits.

16.6.2 Performance Zoning

Some municipalities have enacted zoning regulations that establish performance standards, rather than strict numerical limits on building size or location, as is the case with conventional zoning. Performance zoning, as it is commonly called, regulates development based on the permissible effects or impacts of a proposed use, rather than by the traditional zoning parameters of use, area and density. Under performance zoning, proposed uses whose impacts would exceed specified standards are prohibited unless the impacts can be mitigated.

Performance zoning is often used to address municipal issues concerning noise, dust, vibration, lighting, and other impacts of industrial uses. It is also used by municipalities to regulate environmental impacts, such as stormwater runoff, scenic and visual quality impacts, and defined impacts on community character. The complexity and sophistication of these performance standards vary widely from one municipality to another, depending on the objectives of the program and the capacity of the locality to administer it.

16.6.3 The Floating Zone

Floating zones allow municipalities flexibility in the location of a particular type of use and allow for a use of land that may not currently be needed, but which may be desired in the future. The floating zone is also a way of scrutinizing significant projects for municipal impacts. The local legislative body must approve floating zones. The standards and allowable uses for a floating zone are set forth in the text of the municipality's zoning regulations, but the actual district is not mapped; rather, the district "floats" in the abstract until a development proposal is made for a specific parcel of land and the project is determined to be in accordance with all of the applicable floating zone standards. At that time, the local legislative body maps the floating zone by attaching it to a particular parcel or parcels on the zoning map. Because the floating zone is not part of the zoning map until a particular proposal is approved, the establishment of its boundaries on the zoning map constitutes an amendment to the municipal zoning regulations.

16.6.4 Planned Unit Developments (PUDs)

Planned Unit Developments (PUDs) describe the development of a tract of land (usually a large tract of land) in a comprehensive, unified manner where the development is planned to be built as a "unit." As a mapping designation, they are also known as Planned Development Districts (PDD), and are often a form of floating zone; they are not made a part of the zoning map until a PUD project is approved. The PUDs that are shown on a zoning map may require approval by special use permit.

The PUD concept allows a combination of land uses, such as single and multiple-family residential, industrial, and commercial, on a single parcel of land. It also may allow a planned mix of building types and densities. For example, a single project might contain dwellings of several types, shopping facilities, office space, open areas, and

recreation areas. In creating a PUD, a municipal legislative body would need to follow the procedure for amending zoning to create a new zoning district or to establish special use permit provisions. An application for a PUD district is typically reviewed by the planning board, and a recommendation is made to the legislative body, which may then choose to rezone the parcel.

16.7 Supplementary Controls

The following is a discussion of "stand alone" laws that are commonly adopted to address specific municipal concerns, although they may also be usefully incorporated into zoning, site plan review or subdivision regulations.

16.7.1 Official Map

For any municipality to develop logical, efficient and economical street and drainage systems, it must protect the future rights-of-way needed for these systems. Such preventive action saves a municipality the cost of acquiring an improved lot and structure at an excessive cost or resorting to an undesirable adjustment in the system. To protect these rights-of-ways, state statutes allow a municipality to establish and change an official map of its area, showing the streets, highways, parks and drainage systems (General City Law sections 26, 29; Town Law sections 270, 273; Village Law section 7-724; General Municipal Law section 239-e). Future requirements for facilities may be added to the official map. Without the consent of the municipality, the reserved land may not be used for other purposes.

The official map is final and conclusive in respect to the location and width of streets, highways and drainage systems, and locations of parks shown on it. Streets shown on an official map serve as one form of qualification for access requirements which must be met prior to the issuance of a building permit (General City Law sections 35, 35-a, 36; Town Law sections 280, 280-a, 281; Village Law sections 7-734, 7-736; General Municipal Law section 239-f).

16.7.2 Sign Control

The use and location of signs are typically subject to municipal regulation, either as part of a zoning law or as a separate regulation. Attention is focused on the number, size, type, design and location of signs.

The issues a municipality considers important can be brought together in a sign control program. Without a program, signs can overwhelm a municipality, damaging its character and reducing the effectiveness of communication, including traffic safety messages. With an effective program, signs can aesthetically enhance community character.

A municipality is generally free to prescribe the location, size, dimensions, and manner of construction and design of signs. However, the U.S. Supreme Court has examined the constitutional questions concerning freedom of speech with respect to sign controls, and has placed limits on the authority of municipalities to control the content of the message conveyed on signs.

For more information about the aspects of signage municipalities may regulate, please see the New York Department of State publication "Municipal Control of Signs" at https://www.dos.ny.gov/lg/publications/Municipal%20Control%20of

16.7.3 Historic Preservation

A community policy to protect historic resources and an identification of the particular resources to be protected in the community are the first steps to providing recognition of the historic value of a property or collection of

buildings. Once a municipality has established a policy of historic preservation, it can seek to formally recognize individual historic structures or groups of structures.

The historical importance of a building can be recognized at the state or national level through listing on the State or National Register of Historic Places. These listings are managed, respectively, by the state [Office of Parks, Recreation, and Historic Preservation], and the federal Department of the Interior, in cooperation with the property owner and local municipality. The National Register listing includes recognition of the historical importance of a single property, a group of properties, or a set of properties related by a theme.

Listing on the National Register of Historic Places is an important recognition of a property or an area's historic and cultural significance. Designation can make the property eligible for tax credits and sometimes grants. Additionally, any federal action that might impact such property must undergo a special review that is designed to protect the property's integrity. Similarly, listing on the State Register of Historic Places means that state agency actions that effect a designated property are subject to closer review, and makes the property eligible for grant assistance. Neither a listing on the National nor State Register of Historic Places will protect a structure from the owner's interest in redesigning or demolishing the historic structure. Only a locally-adopted historic preservation law can control such actions.

In adopting a local historic preservation law, the municipality designates individual properties as local historic landmarks, or groups of properties as local historic districts. Such a local law is also likely to provide standards for protection of these designated properties.

If a municipality does not wish to adopt a local historic preservation law, it may want to consider a demolition law. Such a law could require review or a delay before demolition of a historically significant building. This allows time for a community to examine alternatives to demolition, such as purchase of the property by a government or not-for-profit group.

16.7.4 Architectural Design Control

Many aspects of a building's design are regulated through standards for siting, orientation, density, height and setback in a municipality's zoning ordinance or law. Some municipalities wish to go beyond dealing with the general size and siting of a building and its physical relationship with adjacent properties, to dealing with the appropriateness of the architectural design of the building. The review may include examining such design elements as facades, roof lines, window placement, architectural detailing, materials and color.

Architectural review generally requires a more subjective analysis of private development proposals than is possible within most zoning regulations. To do this, municipalities often establish an architectural review board, which should be able to offer guidance on design issues to other boards, such as the planning board or zoning board of appeals. Where authorized, an architectural review board may conduct an independent review of the architectural features of a proposed project. Often, a community chooses to link design review to historic preservation controls, with a focus on the design of new buildings and alterations to existing buildings within historic districts.

16.7.5 Junk Yard Regulations

If a municipality does not have its own junk yard regulations or zoning regulations addressing the siting of junk yards, it must apply the standards set forth in General Municipal Law section 136 for automobile junk yards. This law regulates the collection of junk automobiles, including the licensing of junk yards and regulation of certain aesthetic factors. The application of this state law is limited to sites storing two or more unregistered, old or secondhand motor vehicles which are not intended or in condition for legal use on public highways. The law also applies to used motor vehicle parts, which, in bulk, equal at least two motor vehicles. A municipality may expand the state definition of "junk yard" to encompass other types of junk, such as old appliances, household waste, or uninhabitable mobile homes, in order to regulate aspects of junk not covered by state law and to ensure greater compatibility with surrounding land uses.

16.7.6 Control of Mining

The New York State Mined Land Reclamation Law (Environmental Conservation Law section 23-2703 et seq.) regulates mining operations which remove more than one thousand tons or 750 cubic yards (whichever is less) of minerals from the earth annually. Mines that meet or exceed such thresholds require approval by the New York State Department of Environmental Conservation (DEC). Smaller mines may be regulated by a local mining or zoning regulation. However, even though DEC regulates larger mines, a municipality may regulate the location of all mines through its zoning regulations or prohibit mining altogether from the municipality.

When a municipality permits state-regulated mining to occur within its borders through a special use permit process, conditions placed on the permit may pertain to entrances and exits to and from the mine on roads controlled by the municipality, routing of mineral transport vehicles on roads controlled by the municipality, enforcement of the reclamation conditions set forth in the DEC mining permit, and certain other requirements specified in the state permit (ECL section 23-2703).

16.7.7 Scenic Resource Protection

Scenic resources are important in defining community character. Policies to protect scenic resources may be included in a municipality's comprehensive plan, along with maps illustrating the scenic resource. Once this has been done, it is important to integrate policies into regulations. Appropriate use, density, siting and design standards can protect scenic resources by such methods as limiting the height of buildings or fences in important scenic areas.

16.7.8 Open Space Preservation

Many communities recognize the value of "open space", i.e. vacant land and land without significant structural development. A good way for a municipality to assess the importance of its open space resources is to produce an open space plan or to include an assessment of open space resources as part of its comprehensive plan. Here, a municipality decides how to categorize its open space resources, examine their use and function in the municipality, identify priority areas to be protected, and consider the best means of land conservation. When a municipality has identified its open space resources, it can develop policies to protect them. Those policies should be expressed in the open space plan and/or in the municipality's comprehensive plan, along with the maps showing open spaces. Once this has been done, it is important to ensure the open space policies of the comprehensive plan are implemented through the municipality's land use controls.

16.7.9 Protection of Agricultural Land

One of the critical issues involved in land use planning decisions for agricultural uses is to ensure that agriculture protection deals primarily with the preservation of agriculture as an economic activity and not just as a use of open space. Traditionally, agricultural uses are part of large lot, low density, residential zoning districts.

Article 25-AA of the Agriculture and Markets Law is intended to conserve and protect agricultural land for agricultural production and as a valued natural and ecological resource. Under this statute, collections of parcels can be designated as an agricultural district. To be eligible for designation, an agricultural district must be certified by the county for participation in the state program. Once a district is designated, participating farmers within it may receive reduced property assessments and relief from local nuisance claims and certain forms of local regulation.

Agricultural district designation under Article 25-AA does not generally prescribe land uses. However, under section 305-a of Article 25-AA, municipalities are restricted from adopting regulations, applicable to farm operations

in agricultural districts, which unreasonably restrict or regulate farm structures or practices, unless such regulations are directly related to the public health or safety (Agriculture & Markets Law, section 305-a(1); Town Law section 283-a; Village Law section 7-739). The law also requires municipalities to evaluate and consider the possible impacts of certain projects on the functioning of nearby farms.

Projects that require "agricultural data statements" include certain land subdivisions, site plans, special use permits, and use variances.

Farm operations within agricultural districts also enjoy a measure of protection from proposals by municipalities to construct infrastructure such as water and sewer systems, which are intended to serve nonfarm structures. Under Agriculture and Markets Law, section 305, the municipality must file a notice of intent with both the state and the county in advance of such construction. The notice must detail the plans and the potential impact of the plans on agricultural operations. If, on review at either the county or state levels, the Commissioner of Agriculture and Markets determines that there would be an unreasonable adverse impact, he or she may issue an order delaying construction, and may hold a public hearing on the issue. If construction eventually goes forward, the municipality must make adequate documented findings that all adverse impacts on agriculture will be mitigated to the maximum extent practicable.

"Right-to-farm" is a term that has gained widespread recognition in the state's rural areas within the past several decades. Section 308 of the Agriculture and Markets Law grants protection from nuisance lawsuits to farm operators within agricultural districts or on land outside a district subject to an agricultural assessment under section 306 of the Law. The protection is granted to the operator for any farm activity that the Commissioner has determined to be a "sound agricultural practice." Locally, many rural municipalities have used their home rule power to adopt local "right-to-farm" laws. These local laws commonly grant particular land-use rights to farm owners and restrict activities on neighboring non-farm land that might interfere with agricultural practices.

A purchase of development-rights (PDR) system involves the purchase by a municipal or county government of development rights from private landowners whose land it seeks to preserve in its current state without further development. The PDR system, which has been used extensively in Suffolk County to preserve farmland, can also protect ecologically important lands or scenic parcels essential to rural character of the community. Under PDR, the land remains in private ownership and the government acquires non-agricultural development rights. These development rights, once purchased, are held and remain unsold. The farmer receives payment equal to the development value of the farmland. In return, the farmer agrees to keep the land forever in agriculture. The owner typically files property covenants similar to a conservation easement limiting the use of the property to agricultural production. The nation's first purchase of development rights program to preserve farmland was the Suffolk County in 1974.

The Commissioner of the Department of Agriculture and Markets is authorized to administer two matching grant programs focused on farmland protection. One assists county governments in developing agricultural and farmland protection plans to maintain the economic viability of the state's agricultural industry and its supporting land base; the other assists local governments in implementing their farmland protection plans and has focused on preserving the land base by purchasing the development rights on farms (Article 25-AA of the Agriculture and Markets Law).

The PDR system may have advantages over the TDR system, in that there is a ready market for the purchase and sale of development rights at all times. In addition, the prices of various categories of development rights may be more easily maintained at or near market value, and kept uniform under the PDR system.

16.7.10 Floodplain Management

Floodplain regulations govern the amount, type and location of development within defined flood-prone areas. Federal standards, applicable to communities that are eligible for federal flood insurance protection, include identification of primary flood hazard areas, usually defined as being within the 100-year floodplain. Within flood hazard areas, certain restrictions are placed on development activities. Such restrictions include a requirement that

buildings be elevated above flood elevations or be flood-proofed, and also include prohibitions on the filling of land within a floodplain. Municipalities can adopt their own floodplain regulations, which may be more stringent than the federal standards. Local floodplain regulations can identify a larger hazard area (such as a 500-year floodplain), and may prohibit certain types of construction within flood hazard areas. Municipalities must adopt local floodplain regulations to be eligible for participation in the National Flood Insurance Program.

16.7.11 Wetland Protection

"Wetlands" are areas that are submerged much of the time in either fresh or salt water. In state regulations, they are defined chiefly by the forms of vegetation present. Wetlands provide a number of benefits to a community. Besides providing wildlife habitat, wetlands also provide habitat protection, recreational opportunities, water supply protection, and provide open space and scenic beauty that can enhance local property values. Wetlands also serve as storage for storm water runoff, thus reducing flood damage and filtering pollutants. In coastal communities, they also serve as a buffer against shoreline erosion. The preservation of wetlands can go a long way toward protecting water quality; increasing flood protection; supporting hunting, fishing and shell fishing; providing opportunities for recreation, tourism and education; and enhancing scenic beauty, open space, and property values.

State wetland regulations protect freshwater wetlands greater than 12.4 acres, and 1 acre in the Adirondack Park, freshwater wetlands of unusual local importance, and tidal wetlands. The state has established adjacent wetland buffer zones, prohibiting or restricting certain activities within such areas, and has established standards for permit issuance. Under the Environmental Conservation Law (ECL), DEC shares concurrent jurisdiction with local governments to regulate tidal wetlands.

With respect to freshwater wetlands, three regulatory possibilities are present:

1. All wetlands smaller than 12.4 acres and not deemed of "unusual importance," are subject to the exclusive jurisdiction of the municipalities where the wetlands are located (ECL section 24-0507).
2. Under ECL, section 24-0501, a local government may enact a freshwater wetlands protection law to fully assume jurisdiction over all freshwater wetlands within its jurisdiction from DEC, provided its law is no less protective of wetlands than Article 24 of the ECL and provided that DEC certifies that the municipality is capable of administering the Act. There is also a limited opportunity for counties to assume wetlands jurisdiction if the local government declines.
3. Under ECL, section 24-0509, local governments can now adopt freshwater wetland regulations applying to wetlands already mapped and under the jurisdiction of DEC, provided that the local regulations are more protective of wetlands than the state regulations in effect. No pre-certification by DEC is required.

The United States Government, through the Army Corps of Engineers, also regulates federally defined wetlands. The Corps does not, however, map wetlands in advance of development proposals. When a proposal is made which may impact a wetland falling within federal definitions, the Corps will make a permit determination and impose appropriate conditions to protect the wetland.

16.7.12 Water Resource Protection

One of New York's greatest resources is its abundant water supply, which is safeguarded to protect municipal and private drinking water supplies from disease-causing microorganisms, protect fishery resources, enhance recreational opportunities, prevent erosion and harmful sedimentation, and to protect the environmental quality of adjacent land. Failure to adequately protect drinking water supplies can result in public health hazards and lead to the need for treatment of drinking water at great expense to municipalities.

Municipalities may adopt laws to protect groundwater recharge areas, watersheds and surface waters. Local sanitary codes can be adopted to regulate land use practices that have the potential to contaminate water supplies. Sanitary codes may address the design of storm water drainage systems, the location of drinking water wells, and the design and placement of on-site sanitary waste disposal systems. Water resources can be further protected through the adoption of land use laws that prohibit certain potentially polluting land uses in recharge areas, watersheds and near surface waters. Site plan review laws and subdivision regulations may also be used to minimize the amount of impervious surfaces, and to require that storm water systems be designed to protect water supplies.

Municipalities also have authority under the Public Health Law (PHL) to enact regulations for the protection of their water supplies, even if located outside of the municipality's territorial boundaries. Such regulations must be approved by the New York State Department of Health. Also, under state statutes, "realty subdivisions" – those containing five or more lots that are five acres or less in size – must undergo approval of their water supply and sewerage facilities by the county health department. (This requirement is under Public Health Law, Art. 11, Title II and Environmental Conservation Law, Art. 17, Title 15.)

The Federal Safe Drinking Water Act (SDWA) Amendments of 1996 established stringent water-supply capacity and quality standards for all public drinking water sources eligible for Federal assistance or otherwise coming within Federal regulatory jurisdiction. Originally the SDWA focused primarily on treatment as the means of providing safe drinking water at the tap. The 1996 amendments greatly enhanced the existing law by recognizing source water protection, operator training, funding for water system improvements, and public information as important components of safe drinking water. This approach ensures the quality of drinking water by protecting it from source to tap.

16.7.13 Erosion and Sedimentation Control

Development, earth-moving and some agricultural practices can create significant soil erosion and the sedimentation that frequently follows. Through the adoption of proper erosion, sedimentation, and vegetation-clearing controls, a municipality can protect its land and infrastructure and private property from costly damage, retain valuable soils, protect water quality, and preserve aesthetics within the municipality. Such regulations can be specifically directed at grading, filling, excavating and other site preparation activities, such as the clear-cutting of trees or the removal of vegetation. Local regulations may require the use of particular methods and compliance with minimum standards when carrying out construction and other activities.

New York State has a program for the control of waste-water and storm water discharges in accordance with the Federal Clean Water Act, known as the State Pollutant Discharge Elimination System (SPDES). Article 17 of the Environmental Conservation Law (ECL), entitled "Water Pollution Control", authorized creation of the SPDES program to maintain New York's waters with reasonable standards of purity. The program is designed to eliminate the pollution of New York waters and to maintain the highest quality of water possible, consistent with public health, public enjoyment of the resource, protection and propagation of fish and wildlife, and industrial development in the state. New York State's law is broader in scope than that required by the Clean Water Act in that it controls point-source discharges to groundwater as well as surface water.

16.7.14 Environmental Review

The State Environmental Quality Review Act (SEQRA) was established to provide a procedural framework whereby a suitable balance of social, economic, and environmental factors would be incorporated into the community planning and decision-making processes. SEQRA applies to all state agencies and local governments when they propose to undertake an "action" such as constructing a public building, or approving or funding projects proposed by private owners. (Environmental Conservation Law Article 8; Title 6, NY Codes, Rules & Regulations, Part 617). The intent of SEQRA is to review the environmental impacts of a proposed project and to take those impacts

into account when deciding whether to undertake or allow the project to proceed. Impacts that cannot be avoided through modification of the project should be mitigated by conditions imposed on it.

State regulations categorize all actions as either “Type I” (more likely to have a significant environmental impact), “Type II” (no significant impact), or “Unlisted”, with differing procedural requirements applicable to each. SEQRA review can serve to supplement local controls when the scope and environmental impacts of a project exceed those anticipated by existing land use laws. SEQRA is a far-reaching statute that can provide a municipality with critical information about the impacts of a land development project, so that a more informed decision may be made on the project. The SEQRA process also helps to establish a clear record of decision-making should the municipality ever have to defend its actions. Several publications available from the Department of Environmental Conservation thoroughly explain the SEQRA process.

16.7.15 Moratoria

A moratorium is a local law or ordinance used to temporarily halt new land development projects while the municipality revises its comprehensive plan, its land use regulations, or both. In some cases, moratoria are enacted to halt development while a municipality seeks to upgrade its public facilities or its infrastructure. Moratoria, or interim development regulations, are designed to restrict development for a limited period of time. The courts have placed strict guidelines on the enactment and content of moratorium laws.

16.8 Conclusion

It is apparent from the foregoing discussion that a panoply of land use techniques are available to local governments to assist them in carrying out their comprehensive planning goals to enhance community development and character.

Chapter 17

Public Authorities, Regional Agencies, and Intergovernmental Cooperation

Historically, New York has been and continues to be a true defender of home rule. Under certain conditions and situations, however, there have been issues which are of a statewide concern that cannot be managed under the narrow view of local authority and financial capability in order to bring forward a regional solution.

17.1 The Era of the Authority

New York State has a complex system of public authorities that are formed to achieve public or quasi-public objectives, including financing, building and managing public projects or improving a variety of governmental functions. There are both state and local public authorities in New York. A state authority is a public authority or public benefit corporation established by the State Legislature, with one or more of its members appointed by the governor or who serve as members by virtue of holding a civil office of the state. A local authority is: a public authority or public benefit corporation created by the State Legislature whose members do not hold a civil office of the state, are not appointed by the governor or are appointed by the governor specifically upon the recommendation of the local government; or a not-for-profit corporation affiliated with, sponsored by, or created by a county, city, town or village government; or a local industrial development agency or authority or local public benefit corporation; or an affiliate of such local authority; or a land bank corporation created pursuant to not-for-profit corporation law.

There are also interstate or international authorities in New York State, which are created pursuant to agreement or compact with another state or with a foreign power.

Most public authorities have the power to incur debt and collect user charges, but not to levy taxes or benefit assessments on real estate. While many public authorities have officials who are appointed or serve virtue of another office, the public authority is to act independently and autonomous and has legal flexibility not otherwise permitted to a state department or agency.

Public authorities often raise money through the sale of bonds and operate on little or no state dollars. In theory, a public authority must be self-supporting and able to meet debt obligations through revenues obtained from its own valuable assets, such as fares and user fees. To prevent the State from assuming public authority debt as a moral obligation, the present New York State Constitution explicitly empowers public authorities to issue bonds and incur debt but prevents the State from assuming that liability. (New York Constitution, Art X, section 5)

In Schulz v. State of New York, 84 NY2d 231, 616 NYS2d 343, 350 (1994), the Court of Appeals held that the state is not legally or technically liable on authority bonds nor for authority debt. The state may, however, choose to honor a public authority liability as a moral obligation.

The Port Authority of New York and New Jersey was the first public authority having a regional or statewide purpose, and it was the first of its kind in the Western Hemisphere. It was created under a clause of the United States Constitution permitting compacts between states and approved by the United States Congress. In 1960, only 13 authorities existed in the state which, for the most part, focused upon the construction or management of facilities which had regional significance or were of high economic importance such as ports, bridges, tunnels and highways. The ensuing years, however, might be called "the era of the authority" during which many authorities, having a variety of functions were created. As of June 30th, 2016 there were approximately 577 statewide authorities in existence in New York.[1]

Table 17.1: State, International, and Interstate Public Authorities by Date Created

Name	Year
1920's	
The Port Authority of New York & New Jersey(5 subsidiaries)	1921
Albany Port District Commission	1925
1930's	
Buffalo and Fort Erie Public Bridge Authority	1933
Industrial Exhibit Authority	1936
NYS Bridge Authority	1939
Triborough Bridge and Tunnel Authority[2]	1939
Power Authority of the State of NY	1939
1940's	
Dormitory Authority of the State of New York (2 subsidiaries)	1944
1950's	
NYS Thruway Authority (1 subsidiary)	1950
Ogdensburg Bridge and Port Authority	1950
New York City Transit Authority and Manhattan & Bronx Surface Transit Operating Authority[2]	1953
Port of Oswego Authority	1955
Hudson River-Black River Regulating District	1959
1960's	
NYS Housing Finance Agency (3 subsidiaries)	1961
New York Job Development Authority D/B/A Empire State Development Corp. (1 subsidiary)[3]	1961
State University Construction Fund	1962
Metropolitan Transportation Authority (10 subsidiaries)	1965
Metropolitan Suburban Bus Authority1[2]	1965
Metro-North Commuter Railroad1	1965
Staten Island Rapid Operating Authority[2]	1965
Long Island Railroad[2]	1965
City University Construction Fund	1966
Niagara Frontier Transportation Authority (1 subsidiary)	1967
Battery Park City Authority	1968
NYS Urban Development Corporation (107 subsidiaries)[3]	1968
Natural Heritage Trust	1968
Facilities Development Corporation - part of Dormitory Authority	1968
United Nations Development Corporation	1968
Community Facilities Project Guarantee Fund	1969
Rochester-Genesee Regional Transportation Authority (11 subsidiaries)	1969
State of New York Mortgage Agency	1970

[1] 2006 Comptroller's Report on the Financial Condition of New York State, Office of the State Comptroller.

Table 17.1: (continued)

Name	Year
1970's	
Central New York Regional Transportation Authority (7 subsidiaries)	1970
Capital District Transportation Authority (5 subsidiaries)	1970
NYS Environmental Facilities Corp.	1970
Municipal Bond Bank Agency (1 subsidiary)	1972
NYS Medical Care Facilities Finance Agency - part of Dormitory Authority[4]	1973
NYS Project Finance Agency	1975
NYS Energy Research and Development Authority	1975
Municipal Assistance Corporation for the City of New York	1975
Jacob Javits Convention Center Operating Corporation	1979
Jacob K. Javits Convention Center Development Corporation	1979
NAR Empire State Plaza Performing Arts Center Corporation	1979
1980's	
NYS Science and Technology D/B/A Empire State Development Corp.	1981
NYS Olympic Regional Development Authority	1981
NYS Quarterhorse Breeding and Development Fund Corporation[5]	1982
NYS Thoroughbred Breeding and Development Fund Corporation	1983
Agriculture and NYS Horse Breeding and Development Fund	1983
NYS Thoroughbred Racing Capital Investment Fund	1983
Roosevelt Island Operating Corp.	1984
Development Authority of the North Country	1985
Housing Trust Fund Corporation[6]	1985
NYS Affordable Housing Corporation[6]	1985
Long Island Power Authority (1 subsidiary)	1986
1990's	
Homeless Housing Assistance Corp.	1990
New York Local Government Assistance Corp.	1990
NYS Theatre Institute Corporation	1992
Executive Mansion Trust	1993
Municipal Assistance for the City of Troy	1995
Nassau Health Care Corporation	1997
Roswell Park Cancer Institute Corporation	1997
Westchester County Health Care Corporation	1997
Hudson River Park Trust	1998
2000's	
Nassau County Interim Finance Authority	2000
Buffalo Fiscal Stability Authority	2003
Erie County Medical Center Corporation	2004
New York State Foundation for Science Technology and Innovation	2005
Erie County Fiscal Stability Authority	2005

[2] Subsidiary of MTA or an agency under its jurisdiction

[3] UDC, JDA, and part of NYS Science & Technology Foundation operate under a joint business certificate (D/B/A) using the name Empire State Development Corporation

[4] Dormitory Authority took over operation of MCFFA and FDC, but they retain their separate legal status.

[5] Inactive

[6] Subsidiary of Housing Finance Agency

17.1.1 Establishment of Authorities

State authorities and local authorities, with the exception of not-for-profits, are created by special acts of the legislature that gives the entities explicit powers and limitations. Not-for-profit entities that are determined to be a local authority, based on being affiliated, sponsored or created by a municipality are not created by a special act of legislature, but are organized pursuant to not-for-profit law. As a result, authorities display wide variation with respect to their powers and limitations. The Public Authorities Accountability Act (PAAA) of 2005 and Public Authorities Reform Act (PARA) of 2009 established general provisions in Public Authorities Law that apply to state and local authorities.

17.1.2 Advantages and Disadvantages

The growth in the number and power of public authorities resulted in the creation of the Public Authorities Control Board (PACB) in 1976.[7]

PACB has approval authority over the financing, acquisition or construction commitments of a number of state public authorities, including the Dormitory Authority, Housing Finance Agency, Urban Development Corporation, Job Development Authority and Environmental Facilities Corporation. The Public Authorities Control Board consists of five members appointed by the Governor, four of whom are recommended by the Senate and Assembly leadership. The Governor appoints the Chair.

A 2006 Report by the Office of the State Comptroller found that the State's largest public authorities had outstanding debt of over $124 billion, including more than $42 billion in State-supported debt.[8]

Although debt service on State-supported debt is paid by taxpayers, such debt has not been approved by voters. Additionally, another report by the Office of the State Comptroller noted that only 11 of the state's public authorities have their borrowing reviewed by the Public Authorities Control Board.

17.1.3 Recent Oversight Changes

The Public Authorities Accountability Act (PAAA) (Chapter 766 of the Laws of 2005) and the Public Authorities Reform Act of 2009 (PARA) represent reforms that recognize the differences between state agencies and public authorities and the importance of those distinctions. At the same time, the Reform Act acknowledges that public authorities are created by, and would not exist but for their relationship with, New York State. As a result of this relationship with state government, public authorities must exhibit a commitment to protecting the interests of New York taxpayers and meet the highest standards of effective and ethical operation.

Accordingly, with the enactment of PAAA, the Authorities Budget Office (ABO) was first created in unconsolidated law as the Authority Budget Office. The ABO was re-established as an independent office when PARA took effect on March 1, 2010. From its inception, the ABO's mission has been to make public authorities more accountable and transparent and to act in ways consistent with their governing statutes and public purpose. The ABO carries out its mission by: collecting, analyzing and disseminating to the public information on the finances and operations of state and local public authorities; conducting reviews to assess the operating and governance practices of public authorities and compliance with state laws; promoting good governance principles through training, policy guidance, the issuance of best practices recommendations and assistance to public authority staff and board members; and investigating complaints made against public authorities for noncompliance or inappropriate conduct.

[7] Laws of 1976, Chapter 39, as amended

[8] 2006 Comptroller's Report on the Financial Condition of New York State, Office of the State Comptroller.

The legislation also established an inspector general, banned procurement lobbying, strengthened provisions for public access to information; provided new rules for the disposing of public authority property, and established codes of ethical conduct for authority directors, officers and employees. PARA includes the following provisions:

- Identification of Public Authorities
  - defines public authorities as state, local, interstate or international, and affiliates or subsidiaries thereof.
- Improved Governance
  - requires board members to sign an acknowledgement of fiduciary duty
  - requires independent board members on State and local authorities and finance committees for those authorities that issue debt;
  - establishes roles and responsibilities of board members for State and local authorities;
  - mandates audit and governance committees for all State and local authorities;
  - mandates training for board members;
  - bans personal loans to board members, officers and employees; and
  - requires financial disclosure.
- Improved Independent Audit Standards
  - requires independent audits;
  - requires rotation of auditors every five years;
  - prohibits non-audit services, unless receiving previous written approval by the audit -committee; and
  - prohibits a firm from performing an authority audit if any executive officer was employed by that firm and participated in any capacity in the audit of such authority during the one-year period preceding the date of the initiation of the audit.
- Increased Transparency
  - continues reporting requirements for state authorities and local authorities.

Table 17.2: Revised Breakdown of Public Authorities By Class

Class	**Description**	**Number**
A	Major public authorities with statewide or regional significance and their subsidiaries	190
B	Entities affiliated with a State agency, or entities created by the State that have limited jurisdiction but a majority of Board appointments made by the Governor or other State officials	68
C	Entities with local jurisdiction	474
D	Entities with interstate or international jurisdiction and their subsidiaries	8
Total		740

17.2 Regional Agencies

In the course of the state's population growth and the expansion of towns, cities and villages there arose concern among the population that some of the state's natural resources could be threatened. There also arose a concern that under certain circumstances, nature itself would unleash its destructive power upon the urbanizing areas of the state. In response to these concerns, the state established a number of agencies with a regional focus to the issues which transcended political boundaries. Regional authorities now carry out such diverse functions as operating regional transportation systems, managing airports, regulating rivers, constructing facilities for colleges and hospitals, developing and operating ports and carrying out urban and economic development activities.

17.2.1 Port Authority of New York and New Jersey

Several interstate regional authorities exist in the New York metropolitan area, including the Port Authority of New York and New Jersey. This authority is operated by a 12 member board of commissioners, half of whom are appointed by the State of New York and half by the State of New Jersey. The Port Authority is responsible for all aspects of port commerce in and around New York City, the Hudson River bridges and tunnels, as well as for the operation of Kennedy, LaGuardia and Newark Airports and numerous other transportation facilities. In addition, the Port authority operates the Port Authority Trans-Hudson Corporation Rapid Transit system (PATH) under the Hudson River between the two states.

17.2.2 Adirondack Park Agency

The https://www.ny.gov/agencies/adirondack-park-agency [Adirondack Park Agency] is an independent, bipartisan state agency responsible for developing long-range park policy in a forum that balances statewide concerns and the interests of local governments in the Park. It was created by New York State law in 1971. The legislation defined the makeup and functions of the agency and authorized the agency to develop two plans for lands within the Adirondack Park. The approximately 2.5 million acres of public lands in the Park are managed according to the Adirondack Park State Land Master Plan. The Adirondack Park Land Use and Development Plan regulates land use and development activities on the 2.9 million acres of privately owned lands in the park.

The agency also administers the Adirondack Park Agency State Wild, Scenic and Recreational Rivers System Act for private lands adjacent to designated rivers in the park, and the State Freshwater Wetlands Act within the Park.

The Agency Board is composed of 11 members, eight of whom are New York State residents nominated by the Governor and approved by the State Senate. Five of the appointed members must reside within the boundaries of the Park. In addition to the eight appointed members, three members serve ex-officio. These are the Commissioners of Departments of Environmental Conservation and Economic Development, and the Secretary of State. Each member from within the Park must represent a different county and no more than five members can be from one political party.

The agency provides several types of service to landowners considering new land use and development within the Park which include:

- Jurisdictional advice: The agency will provide a letter informing a landowner whether a permit is needed for a new land use and development or subdivision, or whether a variance is needed from the shoreline standards of the agency. In many cases the letter advises that no permit or variance is needed. This determination is often helpful in completing financing and other arrangements related to new development in the park.

- Wetland advice: The agency will determine the location of regulated wetlands on a property or the need for a wetland permit.
- Permit application: A landowner proposing new land use or development who knows an agency permit is required may initiate a permit application without first receiving jurisdictional advice.
- Changes to the Park Plan Map: agency staff will advise on criteria, boundaries, and the process for amendment of the Official Map.

17.2.3 Tug Hill Commission

The Tug Hill Region lies between Lake Ontario and the Adirondacks. Larger than the states of Delaware or Rhode Island, its 2,100 square miles comprise one of the most rural and remote sections of New York State and the Northeast. A scattering of public lands covers a tenth of the region, with most of that land used extensively for timber production, hunting, and recreation. The rest is privately owned forest, farms, and homes.

Tug Hill's total population is just over 100,000, two-thirds of which is concentrated in villages around its edge. Its densely forested core of about 800 square miles is among New York's most remote areas, with a population of just a few thousand and few public roads.

The uniqueness of the Tug Hill region and its natural resources were recognized by New York State in 1972 when it created the Temporary Commission on the Tug Hill, a non-regulatory state agency charged with helping local governments, organizations, and citizens shape the future of the region, especially its environment and economy. In 1992, the state legislature passed the Tug Reserve Act, further recognizing the statewide importance of the region's natural resources. Congress has recognized the region as an integral part of the Northern Forest Lands area.

In 1998, new state legislative authorization for the Tug Hill Commission (permanently establishing the Commission within New York State's Executive Law, Article 37, section 847) noted Tug Hill's "lands and waters are important to the State of New York as municipal water supply, as wildlife habitat, as key resources supporting forest industry, farming, recreation and tourism and traditional land uses such as hunting and fishing." Other legislation in 1998 (Chapter 419, Laws of 1998) supported the State's purchase of conservation easements in the Tug Hill region, adding it to similar provisions that apply in New York's Adirondack Park, Catskill Park and watershed of the City of Rochester.

The nine members of its governing body are all residents of the region.

17.2.4 Lake George Park Commission

The Lake George Park and the Lake George Park Commission are established by Article 43 of the Environmental Conservation Law. The purpose of the Commission generally is to preserve, protect, and enhance the unique natural, scenic and recreational resources of the Lake George Park, which consists of Lake George and its land drainage areas. It is entirely within the Adirondack Park. The Commission has specific regulatory and enforcement powers relating to activities on the lake, along the shoreline and within the land drainage basin.

Among other duties, the commission: operates the Lake George Park Commission Marine Patrol (a law enforcement and public safety function); administers regulations governing wharfs, docks and moorings, marinas, navigation, and recreational activities; and administers regulations for the preparation of local storm water management plans and storm water regulatory programs for areas within the park where development is occurring. It must also develop and administer regulations for the discharge of treated sewage effluent, conduct a water quality monitoring program and investigate, identify and abate sources of ground and surface water contamination.

17.2.5 Hudson River Valley Greenway

The Hudson River Valley Greenway is a unique state-sponsored program established by the Greenway Act of 1991. The program is designed to encourage projects and initiatives related to the intersecting goals of natural and cultural resource protection, regional planning, economic development, public access, and heritage and environmental education. It provides technical assistance and catalytic grant funding for planning, water and land trails, and other projects that reinforce these goals. The legislatively defined Greenway area includes all of the municipalities within these counties: Albany, Columbia, Dutchess, Orange, Putnam, Rensselaer, Rockland, Saratoga, Ulster, Washington, Westchester, municipalities in Greene County outside of the Catskill Park, and those portions of New York and Bronx counties adjacent to the Hudson River and within the city's waterfront revitalization program. In keeping with the New York tradition of home rule, the Greenway program has no regulatory authority and participation by municipalities in Greenway programs and projects is entirely voluntary. The Greenway also manages the Hudson River Valley National Heritage Area in partnership with the National Park Service.

17.2.6 Central Pine Barrens Commission

New York's most southeastern county, Suffolk County, occupies the eastern end of Long Island, and comprises over 900 square miles of terrestrial and marine environments. Three of Suffolk County's ten towns are host to a 105,000+ acre, New York State-designated region known as the https://pb.state.ny.us/ (Central Pine Barrens).

A rich concoction of terrestrial and aquatic ecosystems, interconnected surface and ground waters, recreational niches, historic locales, farmlands, and residential communities, this region contains the largest remnant of a forest thought to have once encompassed over a quarter million acres on Long Island. New York State and Suffolk County recognized a need to protect groundwater quality because it is the sole source of drinking water. The region lies over an underground drinking water aquifer known as a "deep recharge area" which supplies much of the area's public water supply. In addition, the Central Pine Barrens region contains fire-dependent, fire-adapted ecosystem and landscape, found in only a few locations in the United States, which contains one of the greatest concentrations of rare, endangered and threatened plans and animals in New York State.

In 1993, New York State's Long Island Pine Barrens Protection Act officially defined this region at the junction of the Towns of Brookhaven, Riverhead, and Southampton, and started a process for regional planning and permitting which continues today. The 1993 Act created a five member Central Pine Barrens Joint Planning and Policy Commission, an Advisory Committee, and a "planning calendar" (now completed), which led to the June 1995 adoption of the Central Pine Barrens Comprehensive Land Use Plan.

The Commission possesses the combined duties of a state agency, a planning board and a park commission and has joint land use review and regulation, permitting, and enforcement authority along with local municipalities. The implementation of the land use plan is overseen and managed by the Commission. In addition, the Commission operates a transfer of development rights and conservation easement program and also engages in a number of stewardship and ecological management activities.

17.3 The Regional Planning Councils

Unlike state-created regional agencies, regional planning councils are locally formed by the agreement of adjoining counties. The primary function of regional planning councils is to study the needs and conditions of an entire region and to develop strategies that enhance the region's communities. Recognition was given to the regional council concept when the federal government authorized the establishment of area-wide planning agencies. These agencies were permitted to receive federal planning funds. The federal government then required proposals for federal funding to be reviewed on a regional level to determine district-wide significance and potential conflict with master planning. This review was undertaken by the regional planning councils. The federal

government later rescinded this requirement, but in the interest of regional planning, New York State continued the program.

Regional councils were created to provide a regional approach to concerns that cross the lines of local governments' jurisdictions. Nationwide, there are over 670 of these regional councils, representing almost all 50 states. These councils are a vehicle for local governments to share their resources, and to make the most of funding, planning, and human resources.

Most are voluntary associations, and do not have the power to regulate or tax. They are primarily funded by local governments, as well as by state and federal funds. The councils are responsible to the representatives of the communities in their regions.

The regional view encourages an impartial, bipartisan conduit for the exchange of information. This exchange allows for objective recommendations for the resolution of problems, including the ability to interrelate many key areas such as housing, transportation, and economic development. Joint municipal presentation also gives local governments more influence with funding sources and legislative bodies.

Planning services provided by regional councils include transportation, housing and community development, groundwater protection, water resource management, wastewater treatment, solid waste disposal, land use, and rural preservation planning. Information services provided by regional councils include the operation of regional data centers, public education and information, and maintenance of regional Geographic Information Systems (GIS). Other services provided by regional councils may include special services for low-income and aging populations, job training and employment services, economic development activities, and small business promotion.

Technical assistance to local governments may also be offered, and can include supplementation of local planning efforts, preparations of grant applications and coordination, cost effective regional purchasing, public administration, financial expertise, and information systems.

17.3.1 Legislation

Articles 12-B and 5-G of the New York State General Municipal Law give affiliated municipalities the legal authority to create regional or metropolitan planning boards and joint-purpose municipal corporations. Programs

New York's regional planning councils provide comprehensive planning for the coordinated growth and development of their regions. This involves conducting regional studies to assess needs, promoting the region's economic climate, environmental health, recreational opportunities, etc., and providing technical assistance to communities within the region.

By presenting a regional perspective on issues, regional councils promote intergovernmental cooperation and serve as a liaison between the State and federal governments and municipalities.

Regional Councils in New York State consist of nine locally created regional planning boards in New York State, and represents 45 of the State's 62 counties. The regional councils in New York are as follows:

Table 17.3: Regional Planning Commissions and Councils

Council	**Participating Counties**
Capital District Regional Planning Commission	Albany, Rensselaer, Saratoga, & Schenectady
Central New York Regional Planning & Development Board	Cayuga, Madison, Onondaga, & Oswego
Genesee/Finger Lakes Regional Planning Council	Genesee, Livingston, Monroe, Ontario, Orleans, Seneca, Wayne, Wyoming, & Yates
Herkimer-Oneida Counties Comprehensive Planning Program	Herkimer & Oneida

Table 17.3: (continued)

Council	Participating Counties
Hudson Valley Regional Council	Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, & Westchester
Lake Champlain-Lake George Regional Planning Board	Clinton, Essex, Hamilton, Warren, & Washington
Southern Tier Central Regional Planning & Development Board	Chemung, Schuyler, & Steuben
Southern Tier East Regional Planning Development Board	Broome, Chenango, Cortland, Delaware, Otsego, Schoharie, Tioga, & Tompkins
Southern Tier West Regional Planning & Development Board	Allegany, Cattaraugus, & Chautauqua

17.3.2 Metropolitan Planning Organizations

Federal highway and transit statutes require, as a condition for spending federal highway or transit funds in urbanized areas, the designation of MPO's which have responsibility for planning, programming and coordination of federal highway and transit investments.

While the earliest beginnings of urban transportation planning go back to the post-World War II years, the federal requirement for urban transportation planning emerged during the early 1960's. The Federal Aid Highway Act of 1962 created the federal requirement for urban transportation planning largely in response to the construction of the Interstate Highway System and the planning of routes through and around urban areas. The Act requires, as a condition attached to federal transportation financial assistance, that transportation projects in urbanized areas of 50,000 or more in population be based on a continuing, comprehensive, urban transportation planning process undertaken cooperatively by the states and local governments — the birth of the so-called 3C, "continuing, comprehensive and cooperative" planning process.

In New York State there are twelve MPO's as follows:

- Adirondack-Glens Falls Transportation Council
- Binghamton Metropolitan Transportation Study
- Capital District Transportation Committee
- Executive Transportation Committee for Chemung County
- Genesee Transportation Council
- Greater Buffalo Niagara Regional Transportation Council
- Herkimer-Oneida Transportation Study
- Ithaca Tompkins County Transportation Council
- Newburg-Orange County Transportation Council
- New York Metropolitan Transportation Council
- Poughkeepsie-Dutchess County Transportation Council
- Syracuse Metropolitan Transportation Council

17.3.3 Regional Solutions through Intergovernmental Cooperation

Voter approval in 1959 of an amendment to the New York Constitution's prohibition on gifts and loans of credit by one local government to another paved the way for general legislative authorization for local governments to participate in a wide variety of intermunicipal endeavors.[9] Article 5-G of the General Municipal law was soon enacted to provide municipal corporations and districts with the power to enter into cooperative or joint agreements between or among them to provide any function, power or duty that each has authority to undertake on its own.

The term "municipal corporation" includes counties (outside of New York City), cities, towns, villages, boards of cooperative educational services, fire districts and school districts. The term "district" includes certain county and town improvement districts;[10] therefore, a very large number and broad range of local government entities are authorized to undertake cooperative activities. Since these local governments are empowered to undertake together any activity each may undertake alone, the opportunity to use an intergovernmental agreement to provide services or projects is only limited by the powers of each participant.[11]

Undertaking a cooperative or joint venture is essentially a business arrangement, and Article 5-G provides substantial leeway for contracting parties to address the many issues that typically are addressed in a business arrangement. Generally, an intermunicipal agreement may contain "any matters as are reasonably necessary and proper to effectuate and progress the joint service" [12] and typically include:

- a description of the joint service or project, an identification of the participants and the authority pursuant to which each will be undertaking the service or project;
- descriptions of the roles of each of the participating entities, and the identification of the managing participant, if any;
- fiscal matters, such as the method for allocating costs;
- the manner for employing and compensating employees;
- timetables and processes for contract review and renegotiation;
- methods for dispute resolution during a contract term; and
- responsibility for liabilities.

Agreements entered into pursuant to Article 5-G require the approval of a majority vote of the full strength of the governing body of each participating municipal corporation or district, unless the governing bodies have adopted mutual sharing plans which allow their respective officers or employees to undertake or authorize the receipt of a joint service in accordance with the plan. A mutual sharing plan can anticipate the potential need to obtain assistance from another eligible local government, either on a routine or extraordinary basis. It contemplates the "handshake" deal between cooperating local governments. Fashioning a cooperative agreement frequently necessitates the identification and resolution of many, sometimes complex, issues. Water, sewer and other joint construction projects will require resolution of design issues and permitting needs in addition to fiscal and operational matters. Participating local governments may choose to form joint committees charged with developing preliminary consensus through the development of recommendations to the involved governing bodies.

Some intermunicipal agreements require implementation through the adoption of complementary local laws. When a joint planning board is created, for instance, the participating local governments will need to adopt, in

[9] Amendment to Article VIII, §1 of the New York State Constitution, approved by the electors in 1959; chapter 102 of the Laws of 1960 implemented this change.

[10] General Municipal Law, §119-n(a) and (b).

[11] General Municipal Law, §119-n(c).

[12] General Municipal Law, section 119-o(2).

addition to the cooperative agreement, compatible local laws that reflect the existence of the joint planning board and provide its authority and responsibilities.

Intermunicipal agreements allow local governments to seek regional, and sometimes creative, solutions to common problems without giving up their underlying authority or jurisdiction. For this reason, they are popular vehicles for achieving cost savings or service improvements in a wide variety of ways. The following is a partial list of examples of topics that may be the subject of Intermunicipal agreements:

- joint water and sewer projects;
- garbage collection;
- recycling centers;
- highway maintenance;
- snowplowing;
- shared recreational and cultural facilities;
- shared government offices;
- computer/data processing;
- joint purchasing;
- shared code compliance personnel;
- joint zoning boards;
- joint land use planning activities;
- joint economic development planning
- coordinated assessment services; and
- shared public safety functions.

Index

schedule

NOUN

Etymology

Summary

A borrowing from French.

Etymon: French *cedule*.

Middle English *cedule*, *sedule*, < **Old French** *cedule* (modern **French** *cédule*), < late **Latin** *scedula* (in medieval and **modern Latin** also written *schedula*), diminutive of **Latin** *sceda* (**medieval Latin** also *scheda*): see **scede** *n.*, **schede** *n.* The word has passed from **Latin** into most of the **Romanic** and **Germanic** languages: **Provençal** *cedula*, *cedola*, **Spanish** *cédula*, **Portuguese** *cedula*, **Italian** *cedola*; **Middle High German** *zedele*, *zetele* (modern **German** *zettel*), **Middle Low German** *sedele*, **Middle Dutch** *cedule*, *cedele* (**Dutch** *cedel*, *ceel*), **Swedish** *sedel*, **Danish** *seddel*, **Icelandic** *seðill*.

Notes

In the 16th cent., both in **French** and **English**, the spellings *scedule* and *schedule*, imitating the contemporary forms of the **Latin** word, were used by a few writers. In **French** this fashion was transient, but in **English** *schedule* has been the regular spelling from the middle of the 17th cent. The original pronunciation /ˈsɛdjuːl/ continued in use long after the change in spelling; it is given in 1791 by Walker without alternative; in his second ed. (1797) he says that it is 'too firmly fixed by custom to be altered', though on theoretical grounds he would prefer either /ˈskɛdjuːl/ , favoured by Kenrick, Perry, and Buchanan, or—'if we follow the French'— /ˈʃɛdjuːl/ . The latter he does not seem to have known either in actual use or as recommended by any orthoepist. Smart, however, in 1836 gives /ˈʃɛdjuːl/ in the body of his Dictionary without alternative, although in his introduction he says that as the word is of **Greek** origin the normal pronunciation would be with /sk/ . Several later dictionaries recognize /ˈsɛdjuːl/ as permissible, but it is doubtful whether this was really justified by usage. In England the universal pronunciation at present seems to be with /ʃ/ ; in the U.S., the authority of Webster has secured general currency for /sk/ .

Meaning & use

1. † A slip or scroll of parchment or paper containing writing; a ticket, label, placard; a short note. *Obsolete.* **1397–1650**

2.a. † Originally (as specific use of sense 1), a separate paper or slip of parchment accompanying or appended to a document, and containing explanatory or supplementary matter; in 16–17th cent. sometimes used for a codicil to a will. *Obsolete.* **c1420–1803**

law

2.b. Hence (without material reference) an appendix to an Act of Parliament or a legal instrument, containing (often in tabular form) a statement of details that could not conveniently be placed in the body of the document. **1429–**

law parliament

2.c. In wider sense, any tabular or classified statement, esp. one arranged under headings prescribed by official authority, as, e.g. an insolvent's statement of assets and liabilities, a return of particulars liable to income or other tax, and the like. Also occasionally a blank form to be filled up by the insertion of particulars under the several headings. **1560–**

With reference to the British Income Tax, 'Schedule A,' 'Schedule B,' etc., are the official names for the forms of return applicable severally to the various classes into which sources of taxable income are divided.

economics and commerce

3. U.S. (See quot. 1860.) **1860–**

U.S. English

4.a. A time-table. Originally U.S. (but cf. **schedule** *v.*). Also *transferred* and in extended sense, a programme or plan of events, operations, etc. Frequently in phrases **according to, before, behind, on,** etc., **schedule (time)**. **1863–**

In the sense 'a printed time-table of arrivals and departures of trains, buses, aeroplanes, etc.', the use remains chiefly *North American*.

U.S. English

4.b. An agreed period of time during which a radio transmission may be made; time allocated to listening for transmissions. **1958–**

radio

5. † Used to render Spanish *cédula* and Italian *cedola*: (*a*) A royal writ or permit. (*b*) A bond or promissory note. *Obsolete.* **1622–1762**

law

Additional sense (2009)

a. Each of a series of categories used to grade chemical or pharmaceutical substances according to the extent of legal restriction placed on their availability, possession, or use, and typically differentiated by a letter or number. **1915–**

pharmacology

b. U.S. Each of five classifications to which controlled drugs are assigned on the basis of their medical utility and potential for abuse, denoted by a (typically roman) numeral, the restrictions in place decreasing from Schedule I to Schedule V. Also: these classifications collectively. Cf. **class** *n.* A.I.5e. **1969–**

Introduced by the Controlled Substances Act of 1970.

U.S. English

Pronunciation

BRITISH ENGLISH	U.S. ENGLISH
/ˈʃɛdjuːl/ SHED-yool	/ˈskɛˌdʒul/ SKEJ-ool
/ˈʃɛdjʊl/ SHED-yuhl	/ˈskɛdʒəl/ SKEJ-uhl
/ˈʃɛdʒuːl/ SHEJ-ool	
/ˈʃɛdʒʊl/ SHEJ-uhl	
/ˈskɛdjuːl/ SKED-yool	
/ˈskɛdjʊl/ SKED-yuhl	

Pronunciation keys

Forms

Variant forms

Middle English–1500s **cedule**, **sedule**, Middle English–1500s **cedull**, **sedull**, 1500s–1600s **cedul**, **scedull**, **scedule**, **shedule**, 1500s **schedul(l**, (**chedull**, **seadule**, 1600s **shedulle**), 1500s– **schedule**. Also 1600s in Latin form **scedula**.

Frequency

schedule is one of the 5,000 most common words in modern written English. It is similar in frequency to words like *extraordinary*, *meaningful*, *realm*, *resume*, and *thesis*.

It typically occurs about 20 times per million words in modern written English.

schedule is in frequency band 6, which contains words occurring between 10 and 100 times per million words in modern written English. More about OED's frequency bands

Frequency data is computed programmatically, and should be regarded as an estimate.

Frequency of *schedule, n.*, 1750–2010

* Occurrences per million words in written English

Historical frequency series are derived from Google Books Ngrams (version 2), a data set based on the Google Books corpus of several million books printed in English between 1500 and 2010.

The overall frequency for a given word is calculated by summing frequencies for the main form of the word, any plural or inflected forms, and any major spelling variations.

For sets of homographs (distinct entries that share the same word-form, e.g. *mole*, n.[1], *mole*, n.[2], *mole*, n.[3], etc.), we have estimated the frequency of each homograph entry as a fraction of the total Ngrams frequency for the word-form. This may result in inaccuracies.

Frequency of *schedule, n.*, 2017–2023

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Compounds & derived words

Sort by Date (oldest first)

enschedule, v. **a1616**
transitive. To insert in a schedule; to write down on a list; to schedule.

schedulize, v. **1832–**
intransitive. To make schedules.

time schedule, n. **1848–**

schedule, v. **1862–**
transitive. To enter in a schedule or list. In railway use: To enter (a train) in the time-table (cf. schedule, n. 4). Hence, in extended uses: to…

training schedule, n. 1891–

release schedule, n. 1900–

block schedule, n. 1906–
A schedule or timetable used in secondary education (or occasionally primary), in which the classes a pupil attends each day are fewer in number and...

rehearsal schedule, n. 1910–

schedular, adj. 1928–
Of or pertaining to a schedule; (esp. of a system of taxation) organized according to a schedule.

television schedule, n. 1928–
A printed (or in later use electronic) schedule listing the programmes on television during a particular period, and the times at which they are to...

sked, n. 1929–
a. = schedule, n.; b. = scheduled, adj.; also elliptical, a scheduled flight.

plug schedule, n. 1947–

TV schedule, n. 1947–
= television schedule, n.

shooting schedule, n. 1950–
In shooting, n. 6b.

sched, n. 1958–
= schedule, n. 4b.

specific

ADJECTIVE & NOUN

Etymology

< medieval Latin *specificus*, **<** *speciēs* **species** *n.*: see **-fic** *suffix*. Hence also **French** *spécifique*, **Italian** *specifico*, **Spanish** *especifico*, **Portuguese** *especifico*.

Meaning & use

ADJECTIVE

1.a. Having a special determining quality. **a1631–**

> ***a*1631** For, God no such specifique poyson hath As kills we know not how.
> J. Donne, *Poems* (1912) 194
>
> **1650** Which sentence is..true..of all parts that naturally exist in any specifique body.
> J. Bulwer, *Anthropometamorphosis* 72
>
> **1842** Bones are valuable as a specific manure, because they contain phosphate of lime.
> J. C. Loudon, *Suburban Horticulturist* 59

1.b. † Having the qualities of a species. *Obsolete.* **1650**

> **1650** Man is not at once an Individuum and a specifique Individuum.
> J. Bulwer, *Anthropometamorphosis* 129

taxonomy

2.a. Of qualities, properties, effects, etc.: Specially or peculiarly pertaining to a certain thing or class of things and constituting one of the characteristic features of this. **1665–**

> **1665** Plants and other Medicinal things, that have specifique Vertues.
> *Philosophical Transactions* (Royal Society) vol. 1 48
>
> **1668** That thou to Truth the perfect way may'st know, To thee all her specifick forms I'le show.
> J. Denham, *Poems* 148
>
> **1712** The distinguishing Perfections, or, if I may be allowed to call them so, the Specifick Qualities of the Author whom he peruses.
> J. Addison, *Spectator* No. 409. ¶5

1744 The specific taint or peculiar cause of the malady.
G. Berkeley, *Siris* (ESTC T72826) §87

1782 The different portions of elementary fire contained in such substance, and absorbed by it,..and hence called its specific fire.
Philosophical Transactions (Royal Society) vol. 72 196

1804 The specific operation of mercury on the constitution.
J. Abernethy, *Surgical Observations* 150 (note)

1837 The primitive and specific molecule proper to each organ pre-exists already in the infant embryo.
P. Keith, *Botanical Lexicon* 139

1863 Between these unities of quantity there exist relations independent of their specific magnitudes.
E. V. Neale, *Analogy of Thought & Nature* 36

1884 Plants, in which the demarcation of the annual rings is constantly absent as a specific peculiarity.
F. O. Bower & D. H. Scott, translation of H. A. de Bary, *Comparative Anatomy Phanerogams & Ferns* 503

2.b. *specific difference*: see **difference** *n.*[1] 5d. **1649–**

1649 Al actions equally proceed from the Soul, but receive their Specifique difference from the instruments.
J. Bulwer, *Pathomyotomia* i. vi. 32

1697 A perfect Definition consists of the next Genus and Specifick Difference.
translation of F. Burgersdijck, *Monitio Logica* ii. ii. 6

1777 It was necessary to find some specific difference between them.
J. Priestley, *Disquisitions Matter & Spirit* xviii. 234

1841 Where there is no specific difference, as between round and square, all definition must be more or less arbitrary.
T. Carlyle, *On Heroes* iii. 133

1861 This feature in the case..constitutes the specific difference between justice, and generosity.
J. S. Mill, *Utilitarianism* (1874) v. 74

2.c. Peculiar *to*, characteristic *of*, something. **1667–**

1667 The mediation of concurring circumstances specifique to that Issue.
E. Waterhouse, *Short Narrative Fire in London* 9

1874 Their style..is specific to Italy in the middle of the fifteenth century.
J. A. Symonds, *Sketches in Italy & Greece* 251

1897 Ulcers in the stomach specific of these affections may arise.
T. C. Allbutt et al., *System of Medicine* vol. III. 519

2.d. *Physics*. Of or designating a dimensionless number equal to the ratio of the value of a property of a given substance to the value of the same property of some reference substance (as water) or of vacuum under the same conditions, so providing a relative value for comparison with different substances, as *specific gravity* (see **gravity** *n.* II.4c); *specific heat* (see **heat** *n.* 2c); **specific inductive capacity** = *dielectric constant n.* at **dielectric** *adj.* B.2b; **specific viscosity**, the difference between the viscosity of a solution of a given concentration and that of the pure solvent. **1838–**

1838 I feel satisfied that the experiments altogether fully prove the existence of a difference between dielectrics as to their power of favouring an inductive action through them; which difference may..be expressed by the term specific inductive capacity.
M. Faraday in *Philosophical Transactions* (Royal Society) vol. 128 33

1918 One arm was then filled with water, and the other with a mixture of water and ethyl alcohol, the specific inductive capacity of which was known.
Physical Review vol. 12 50

1935 Staudinger later adopted the term 'specific viscosity', for the quantity η_r -1.
Journal of Physical Chemistry vol. 39 157

1944 Guggenheim has suggested the term *permittivity* for the fundamental quantity and *specific inductive capacity* or *dielectric constant* for the derived quantity. In conformity with the other suggestions in this paper it would be more uniform to adopt *permittivity* and *relative permittivity*... Similarly in the magnetic case we have *permeability* and *relative permeability*.
London, Edinburgh & Dublin Philosophical Magazine 7th Series vol. 35 83

1959 The dielectric constant *K* of an insulating material is the ratio of the capacitance C_z of a capacitor using the material as the dielectric to the capacitance C_a using air as the dielectric... This property of the material is sometimes called inductivity or specific inductive capacity.
K. Henney, *Radio Engineering Handbook* (ed. 5) iv. 2

1966 At the hightest rate of shear used in these experiments, the reduced specific viscosity was independent of concentration.
M. L. Miller, *Structure of Polymers* v. 206

physics

3.a. *Medicine*. Of remedies, etc.: Specially or exclusively efficacious for, or acting upon, a particular ailment or part of the body. **1677–**

1677 It is esteemed to be specifick for Malignant Diseases.
W. Harris, translation of N. Lémery, *Course of Chymistry* i. xvi. 195

a1699 Garlick..I believe is..a Specifick Remedy of the Gout.
W. Temple, *Ess. Health & Long Life* in *Works* (1720) vol. I. 285

1704 Physitians mention in their Books three kinds of Specifick Medicines.
J. Harris, *Lexicon Technicum* vol. I. (at cited word)

1778 Little can be said in favour of specific medicines, but what is equally applicable to specific methods of cure.
R. James, *Dissertation upon Fevers* (ed. 8) 80

1899 The internal administration of specific remedies.
T. C. Allbutt et al., *System of Medicine* vol. VI. 795

pharmacology

3.b. *Pathology*. Of a distinct or characteristic kind. **1804–**

1804 We must not impute the occurrence of these peculiar sores to mere irritability, but to some specific contagion.
J. Abernethy, *Surgical Observations* 166

1843 The specific irritation of the skin termed scabies.
R. J. Graves, *System of Clinical Medicine* xx. 234

1876 Specific-pus, is not distinguished histologically and chemically from common pus.
J. Van Duyn & E. C. Seguin, translation of E. L. Wagner, *Manual of General Pathology* 260

1898 Specific peribronchitis of the trachea and bronchi.
T. C. Allbutt et al., *System of Medicine* vol. V. 150

1899 Some of thses lesions are 'specific' in the sense of being characteristic of syphilis.
T. C. Allbutt et al., *System of Medicine* vol. VII. 685

pathology

4.a. Precise or exact in respect of fulfilment, conditions, or terms; definite, explicit. **1740–**

1740 Upon a Bill to compell a Specifick Execution of Articles of Agreement, entred into between the Partys for setling the Boundarys of the Province of Pensilvania.
J. Penn , etc. (title)

1768 This may..be effected by a specific delivery or restoration of the subject-matter in dispute to the legal owner.
W. Blackstone, *Commentaries on Laws of England* vol. III. 116

1856 We do not as yet know the specific commandments of the moral law.
P. E. Dove, *Logic of Christian Faith* v. ii. 317

1861 She had been specific in her requests, urging him..to settle Orley Farm upon her own boy.
A. Trollope, *Orley Farm* (1862) vol. I. ii. 12

1871 A command must by its very nature be specific.
W. Markby, *Elements of Law* §109

4.b. Exactly named or indicated, or capable of being so; precise, particular. **1766–**

1766 What it is that gave a man an exclusive right to retain..that specific land.
W. Blackstone, *Commentaries on Laws of England* vol. II. 8

1779 A specific misconduct, brought home to a particular man, is always to be attended to.
E. Burke, *Correspondence* (1844) vol. II. 264

***c*1788** Without a publick well-vouched account of the specifick expenditure thereof.
E. Burke, *Articles of Charge against W. Hastings* in *Works* (1813) vol. XII. 370

1828 There are..two specific classes of grievances complained of by the Lower-Canadians.
J. Mackintosh, *Speech in Commons* in *Works* (1846) vol. III. 492

1865 No specific preparations had been made by the states to perform their part of the engagement.
H. Phillips, *American Paper Currency* vol. II. 68

1880 The specific cause of the quarrel, if cause there was, has not been clearly revealed.
L. Stephen, *Alexander Pope* iv. 103

4.c. Of a duty or tax: assessed on an article or goods according to quantity or amount without reference to value. **1789–**

1789 I shall not pretend to say that there ought not to be specific duties laid upon every one of the articles enumerated.
Deb. Congr. U.S. 9 April (1834) 107

1845 I had recommended..the abolition of the minimum principle and specific duties.
J. K. Polk, *Diary* 1 November (1929) 23

1901 If the tax is specific and not *ad valorem*.
J. S. Nicholson, *Princ. Polit. Econ.* (new edition) vol. III. 348

1930 Specific duties are those which are based on the quantity of the imported produce, i.e. they are so much per lb. or so much per gallon, etc.
M. Clark, *Home Trade* iii. xxii. 187

1959 Specific duties are expressed as an amount of money on the unit amount of the product while *ad valorem* duties are expressed as a percentage addition to the selling price.
Chambers's Encyclopedia vol. V. 512/2

economics and commerce

5. Of or pertaining to, connected with, etc., a distinct species of animals or plants. **specific epithet** (chiefly *Botany* and *Microbiology*), the second (adjectival) element in the Latin name of a species according to the binomial system, which follows the generic name and serves to distinguish a species from others in the same genus; **specific name**, (*a*) (now chiefly *Zoology*) = *specific epithet* at sense A.5; (*b*) (now chiefly *Botany* and *Microbiology*), the Latin name of a species, which in the binomial system comprises a generic name and a specific epithet. **1753–**

1753 The more accurate of the modern naturalists have..set about the reformation of the specific names of things.
Chambers's Cyclopædia Suppl. (at cited word)

1753 But as this holds in all the genus, there can be no use made of it as a specific character.
Chambers's Cyclopædia Suppl. (at cited word)

1775 A Plant is said to be compleatly named when it has got both the generic and specific name.
H. Rose, *Elements of Botany* 302

1796 Many of the Specific Characters..are entirely new.
W. Withering, *Arrangement of British Plants* (ed. 3) vol. I. p. v

1842 Specific names..often indicate the situation or the county where the plant is found naturally.
J. C. Loudon, *Suburban Horticulturist* 19

1866 Such characters of course are not of specific value.
C. Darwin, *Origin of Species* (ed. 4) ii. 58

1870 Scarcely entitled to specific rank.
J. D. Hooker, *Student's Flora of British Islands* 147

1871 The mistake Cotteau is accused of making of assigning to Desor instead of Agassiz the specific name of *Pseudodiadema hemisphæricum* is entirely unfounded.
Nature 20 July 221/1

1880 Thus one great cause of specific modification would be wanting.
A. R. Wallace, *Island Life* 359

1905 A specific name becomes a subspecific name when the species so named becomes a subspecies.
Règles International Nomancl. Zoology (Congrès Internat. de Zool.) 31

1906 When a..species is moved into another genus..the first specific epithet..must be retained.
International Rules Bot. Nomenclature 1905 47

1926 A species [of animal] is a community, or a number of related communities, whose distinctive morphological characters are..sufficiently definite to entitle it, or them, to a specific name.
Reports of British Association for Advancement of Science 1925 75

1945 Binomial nomenclature was not intended by Linnaeus to supersede the polynomial specific name.
Rhodora vol. XLVII. 274

1964 The name of a species consists of two words (binomen)..;..the first word is the generic name, the second word is the specific name.

International Code Zool. Nomenclature ii. 7

1966 *Tuber*..was accompanied by binary specific names, e.g. *Tuber cibarium*, and is therefore admissible.
International Code Bot. Nomenclature iii. 27

1966 The name of a species is a binary combination consisting of the name of the genus followed by a single specific epithet.
International Code Bot. Nomenclature iii. 30

1970 The specific epithet *racemosa* is.. not applicable in the genus *Amelanchier*.
Watsonia vol. 8 156

1974 Gaspard Bauhin, a Swiss botanist of the late 16th and early 17th centuries, designated plants by a generic and a specific name.
Encyclopædia Britannica Macropædia vol. II. 1019/2

1982 Specific epithets..are adjectives, and the same one may be combined with different generic names and used for a number of unrelated organisms; for example, *Erythronium americanum*, the trout lily; *Euarctos americanus*, the American black bear.
K. Arms & P. S. Camp, *Biology* (ed. 2) xx. 310

animals | microbiology | plants | taxonomy

NOUN

1.a. A specific remedy. (See A.3a.) **1661–**

1661 I doe assent that both Lime & Sulphur are in some affections specifics for the Lungs.
J. Evelyn, *Fumifugium* i. 8

1671 Elder-tree..is a specific for the cure of the Dropsie.
W. Salmon, *Synopsis Medicinæ* iii. xxii. 427

1684 Specificks for Fevers seem to have place chiefly in Agues.
translation of T. Bonet, *Guide to Practical Physician* vi. 170

1732 If there be a specifick in Aliment it is certainly Whey.
J. Arbuthnot, *Practical Rules of Diet* iv. 429

1779 How did you light on your specifick for the toothach?
S. Johnson, *Letter* 16 October (1992) vol. III. 188

1843 All specifics lead to a false system of therapeutics.
R. J. Graves, *System of Clinical Medicine* xxvii. 351

1873 Always you find among people in proportion as they are ignorant, a belief in specifics.
H. Spencer, *Study of Sociology* (1877) i. 20

attributive

1859 Her parties were the dullest in London, and gradually fell into the hands of popular preachers, Specific Doctors, raw Missionaries [etc.].
G. Meredith, *Ordeal of Richard Feverel* vol. II. iii. 23

pharmacology

1.b. *transferred* and *figurative*. **1669–**

1669 Having found out certain Specifics as it were, to palliate the several Vices of Wines of all sorts.
W. Charleton, *Mysterie of Vintners* in *Two Discourse* 185

***a*1680** For all Defences and Apologies Are but Specifics t' other Frauds and Lies.
S. Butler, *Genuine Remains* (1759) vol. I. 224

1779 A more infallible specific against tedium and fatigue.
J. Moore, *View of Society & Manners in France* (1789) vol. I. xviii. 140

1841 I have no intention of putting forward specifics for real afflictions, or pretending to teach refined methods for avoiding grief.
A. Helps, *Aids Contentm.* in *Essays* (1842) 17

1860 Against this evil the system of personal representation..is almost a specific.
J. S. Mill, *Considerations on Representative Government* (1865) 59/2

2. A specific difference, quality, statement, subject, disease, etc. Usually *plural*; also *loosely*, details, particulars. **1697–**

1697 The Difference is taken from his Form... But because incorporeal Substances have none, and the Specificks of Corporeal, even lye hid [etc.].
translation of F. Burgersdijck, *Monitio Logica* ii. ii. 7

1766 The Phœnomenon..is owing to two most uncommon Specifics, in the Constitution of your Mind, and of your Body.
R. Griffith & E. Griffith, *Letters Henry & Frances* vol. III. 148

1874 Generics never take hold of men. It is specifics that take hold of them.
H. W. Beecher, *Lectures on Preaching* 3rd Series viii. 153

1888 Acute specifics, pneumonia, and septicæmia.
W. R. Gowers, *Manual of Diseases of Nervous System* vol. II. iv. 298

1891 Even in London Board Schools only 20,000 scholars were presented in specifics.
Daily News 19 October 6/5

1966 The latter [*sc.* journalism]..considers the specifics of an event, using implicit general principles of behaviour out of necessity.
New Statesman 9 September 350/2

1972 Let's get down to specifics. What can we actually do to help?
G. Bromley, *In Absence of Body* iii. 30

1975 Placing this tragedy of a woman's sexual obsession with her stepson within the arresting specifics of this strange setting does at least remove it from the fury-bestrewn never-never-land of the antique Greek drama.
New York Times 11 September 8/1

1977 He told us he had been investing in property in London, but he was a bit vague about the specifics.
F. Branston, *Up & Coming Man* xii. 125

1980 Planning should start..with specifics rather than concepts.
Journal of Royal Society of Arts February 152/1

3. A specific word, name, etc., *spec.* in taxonomy or toponymy. **1962–**

1962 The elements in geographic names that indicate the class of the entity, e.g., in *Red Hill*..or *Lake Erie.., Hill* and *Lake*, are the generic elements (or 'generics'). The elements that identify the particular entity, in the above instances *Red* and *Erie*, are called the specific elements (or 'specifics').
Burrill & Bonsack in F. W. Householder & S. Saporta, *Prob. Lexicography* 195

1969 Although many scientists of the day gratefully used her [*sc.* Mary Anning's] finds to establish their own reputation, not one native type bears the specific *anningii*.
J. Fowles, *French Lieutenant's Woman* viii. 50

1977 Most of the specifics, or second elements, in such names are demonstrably of Gaelic and not of Pictish origin.
Word vol. 28 133

taxonomy

Pronunciation

BRITISH ENGLISH

/spɬˈsɪfɪk/

/spɛˈsɪfɪk/

U.S. ENGLISH

/spəˈsɪfɪk/

Pronunciation keys

Forms

Variant forms

Also 1600s **specifique**, 1600s–1700s **specifick**.

Frequency

specific is one of the 500 most common words in modern written English. It is similar in frequency to words like *century*, *grow*, *language*, *necessary*, and *young*.

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Compounds & derived words

Sort by Date (oldest first)

specificly, adv. **1650**
Specifically.

unspecificate, adj. & n. **1674–1734**
adj. (See quot. 1674.)

specificness, n. **1682–**
Specific character or quality.

specific performance, n. **1701–**

The performance of contractual duties; an instance of this; (also) a remedy granted by a court compelling a person to perform contractual duties...

subspecific, adj. 1795–
Of, relating to, or of the nature of a subspecies.

female-specific, n. & adj. 1810–
a. n. (In form female specific) a remedy for abdominal pains caused by menstruation, and for various other gynaecological ailments (cf. specific, n...

specific energy, n. 1844–
a. Physiology the specific activity or function of a given nerve, cell, etc. (now historical); b. Physics the quantity of energy, (formerly) per unit...

non-specific, adj. & n. 1860–
Not specific; not restricted in extent, effect, etc.; (Medicine) not caused by or characteristic or diagnostic of a specific disease or infection.

specific volume, n. 1868–
The volume of a substance per unit mass; the reciprocal of density.

specific rotatory power, n. 1876–
The angle through which the plane of polarization of light of a specified wavelength is rotated by passage through a column of an optically active...

specific conductance, n. 1885–
The conductivity of unit length of a material of unit cross-sectional area; the reciprocal of resistivity (see resistivity, n.).

specificize, v. 1885–
transitive. To make specific.

co-specific, adj. 1889–
= conspecific, adj.

interspecific, adj. 1889–
Existing or prevailing between different species. Also, formed or obtained from (individuals of) different species.

specific conductivity, n. 1898–
= specific conductance, n.

specific refractive constant, n. 1899–
A constant relating the refractive index (n) of a material to its density (ρ), given by $(n^2 - 1)/(\rho(n^2 + 2))$.

specific resistance, n. 1899–
= resistivity, n.

specific rotation, n. 1899–
= specific rotatory power, n.

cell-specific, adj. 1914–

overspecific, adj. 1918–
Excessively specific; defined or specified too narrowly or precisely.

intraspecific, adj. 1919–
Produced, occurring, or existing within a (taxonomic) species or between individuals of a single species.

monospecific, adj. 1921–
Biology. Containing or consisting of only one species.

sex-specific, adj. 1921–

age-specific, adj. 1922–
(Of a condition, process, or phenomenon) specifically relating to, connected with, or affecting a particular age group or range.

species-specific, adj. 1924–
Found in or characteristic of the members of one species only.

specific surface, n. 1924–
The surface area per unit volume of a finely-divided substance.

specific charge, n. 1926–
The ratio of the charge of an ion or subatomic particle to its mass.

strain-specific, adj. 1926–
(Of a vaccine, antibody, etc.) targeting or corresponding to only one specific genetic variant; (of a pathogen) restricted to infecting or causing…

heterospecific, adj. 1929–
a. Said of blood or serum of different blood groups; heterospecific pregnancy one in which the red blood cells of the fœtus would be agglutinated by…

antigen-specific, adj. 1930–
Specific to or for a particular antigen; possessing receptors that bind with a particular antigen.

polyspecific, adj. 1931–
a. Consisting of or relating to many species; b. having more than one specificity; specific for several or many substances; polyvalent.

specific consumption, n. 1931–
The weight of fuel consumed by an engine per unit time per unit of power or thrust developed; the reciprocal of specific impulse.

organ-specific, adj. **1932–**
Specific to or for a particular organ.

specific ionization, n. **1932–**
The number of ion pairs produced by an ionizing particle per unit path length.

supraspecific, adj. **1936–**
Above the level or rank of the species.

virus-specific, adj. **1937–**

specific activity, n. **1938–**
The activity of a given radioisotope per unit mass.

function-specific, adj. **1939–**
Defined by or dedicated to a specific role or function.

infra-specific, adj. **1939–**
(Applied to a category) at a lower taxonomic level than a species.

specific refraction, n. **1940–**
= specific refractive constant, n.

phage-specific, adj. **1947–**

specific thrust, n. **1949–**
= specific impulse n.

stereospecific, adj. **1949–**
Of a reaction: = stereoselective, adj. Also of a catalyst: causing a reaction to be (more) stereoselective.

site-specific, adj. **1951–**
Specifically relating to, connected with, or affecting a particular location; (now frequently) spec. (of a work of art, drama, etc.) specially...

language-specific, adj. **1956–**
Distinctive to a specified language.

specific resistivity, n. **1958–**
= resistivity, n.

tissue-specific, n. **1962–**

trans-specific, adj. **1963–**
Passing from one species to another.

gender-specific, adj. **1968–**

regiospecific, adj. **1968–**

Of a reaction taking place at a particular site on a molecule: leading to predominant or exclusive formation of one of two or more possible isomeric...

host-specific, adj. **1969–**

machine-specific, adj. **1972–**

Suitable for use only with a specific system or type of computer.

Senate Bill S1046E

SIGNED BY GOVERNOR

2021-2022 Legislative Session

Relates to the John R. Lewis Voting Rights Act of New York

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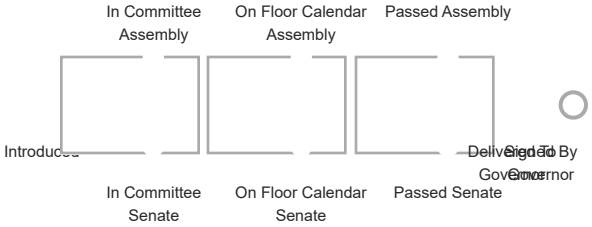

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2021-S1046E (ACTIVE) - DETAILS

See Assembly Version of this Bill: A6678

Law Section: Election Law

Laws Affected:

Desig Art 17 §§17-100 - 17-170 to be Title 1, add Art 17 Title 1 Title Head, Title 2 §§17-200 - 17-222, amd Art 17 Art Head, El L

Versions Introduced in 2019-2020 Legislative Session: A10841

2021-S1046E (ACTIVE) - SUMMARY

Relates to the John R. Lewis Voting Rights Act of New York; establishes rights of actions f denying or abridging the right of any member of a protected class to vote; provides assistar to language-minority groups; provides for preclearance of certain voting policies

DO YOU SUPPORT THIS BILL?

2021-S1046E (ACTIVE) - SPONSOR MEMO

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GET STATUS ALERTS FOR 2021-S1046E

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BILL NUMBER: S1046E

SPONSOR: MYRIE

TITLE OF BILL:

An act to amend the election law, in relation to establishing the John R. Lewis Voting Rights Act of New York, establishing rights of action for denying or abridging of the right of any member of a protected class to vote, providing assistance to language-minority groups, requiring certain political subdivisions to receive preclearance for potential violations of the NYVRA, and creating civil liability for voter intim-idation

PURPOSE:

The purpose of the act is to encourage participation in the elective franchise by all eligible voters to the maximum extent, to ensure that eligible voters who are members of racial, ethnic, and language-minority groups shall have an equal opportunity to participate in the political processes of the State of New York, and especially to exercise the elec-tive franchise; to improve the quality and availability of demographic and election data; and to protect eligible voters against intimidation and deceptive practices.

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2021-S1046E (ACTIVE) - BILL TEXT

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S T A T E O F N E W Y O R K

1046--E

2021-2022 Regular Sessions

I N S E N A T E

January 6, 2021

Introduced by Sens. MYRIE, BAILEY, BIAGGI, BRESLIN, BRISPORT, BROUK, CLEARE, COMRIE, COONEY, FELDER, GAUGHRAN, GIANARIS, GOUNARDES, HINCHEY, HOYLMAN, JACKSON, KAPLAN, KAVANAGH, KENNEDY, KRUEGER, LIU, MANNION, MAY, MAYER, PARKER, RAMOS, REICHLIN-MELNICK, RIVERA, SALAZAR, SANDERS, SEPULVEDA, SERRANO, STAVISKY, THOMAS -- read twice and ordered printed, and when printed to be committed to the Committee on Elections -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Elections in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported favorably from said committee and committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported favorably from said committee and committed to the Committee on Rules -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the election law, in relation to establishing the John R. Lewis Voting Rights Act of New York, establishing rights of action for denying or abridging of the right of any member of a protected class to vote, providing assistance to language-minority groups, requiring certain political subdivisions to receive preclearance for potential violations of the NYVRA, and creating civil liability for voter intimidation

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. This act shall be known and may be cited as the "John R. Lewis Voting Rights Act of New York (NYVRA)".

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD02423-24-2

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COMMENTS

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