ADMINISTRATIVE LAW

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This Article reviews developments in administrative law and practice during 2013-2014 in the judicial, executive, and legislative branches of New York State government. The discussion highlights certain decisions announced by the New York Court of Appeals, certain key initiatives of the Cuomo administration, and certain legislation that affects the work of State agencies.

I. JUDICIAL BRANCH

The decisions of the Court of Appeals covered a range of interesting topics in 2013-2014, which included municipal home rule and hydrofracking, the New York City ban on soft drinks, the authority of the State Comptroller to audit health care providers reimbursed by the New York State Health Insurance Program ("NYSHIP"), the Department of

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Taxation and Finance's interpretation of statutory resident, and the Freedom of Information Law ("FOIL") and personal privacy.

A. Municipal Home Rule and Hydrofracking

The pros and cons of hydrofracking have occupied the headlines in New York State for many months, if not years, because of the presence of the Marcellus Shale in the Southern tier of New York.[1] In *Wallach v. Town of Dryden* ("*Wallach*"), the Court of Appeals was asked to consider "whether towns may ban oil and gas production activities, including hydrofracking, within municipal boundaries through the adoption of local zoning laws."[2] Although the Executive Branch ultimately announced in December 2014 that high-volume hydrofracking would be banned in New York,[3] the State's decision was not considered a foregone conclusion in June 2014 when the *Wallach* was decided.[4] So the *Wallach* decision was a heavily freighted one.[5]

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1. *See, e.g.*, Mireya Navarro, *Latest Drilling Rules Draw Objections*, N.Y. TIMES, July 14, 2011, *available at* http://www.nytimes.com/2011/07/15/science/earth/15frack.html; Mireya Navarro, *32,100 and Counting: New Yorkers Speak Out on Fracking*, N.Y. TIMES, Jan. 17, 2012, *available at* http://green.blogs.nytimes.com/2012/01/17/32100-and-counting-new-yorkers-speak-out-on-fracking/; Mireya Navarro, *A New Weapon in the Fracking Wars*, N.Y. TIMES, Mar. 29, 2012, *available at* http://green.blogs.nytimes.com/2012/03/29/a-new-weapon-in-the-fracking-wars/.

2. 23 N.Y.3d 728, 739, 16 N.E.3d 1188, 1191, 992 N.Y.S.2d 710, 713 (2014).

3. Andrew C. Revkin, *With Unresolved Health Risks and Few Signs of an Economic Boon, Cuomo to Ban Gas Fracking*, N.Y. TIMES, Dec. 17, 2014, http://dotearth.blogs.nytimes.com/2014/12/17/with-unresolved-health-risks-and-few-signs-of-an-economic-boon-cuomo-to-ban-gas-fracking/; Glenn Coin, *NY environmental commissioner: I will ban fracking in New York*, SYRACUSE.COM (Dec. 17, 2014, 12:42 PM), http://www.syracuse.com/news/index.ssf/2014/12/ny_environmental_commissioner_i_will_ban_fracking_in_new_york.html.

4. *See, e.g.*, Bill Carey, *Gov. Cuomo May Soon Have Decision on Hydrofracking in NYS*, TIME WARNER CABLE NEWS (Dec. 16, 2014, 6:09 PM), http://centralny.twcnews.com/content/news/793331/gov—cuomo-may-soon-have-decision-on-hydrofracking-in-nys/ (noting that "[i]f one thing has been clear from the start of Andrew Cuomo's tenure as Governor [in January 2011], it's the political danger of trying to resolve the issue of hydrofracking.").

5. *See, e.g.*, Mireya Navarro, *Judge's Ruling Complicates Hydrofracking Issue in New York*, N.Y. TIMES, Feb. 22, 2012 (speaking about the Supreme Court ruling), *available at* http://www.nytimes.com/2012/02/23/nyregion/judges-ruling-complicates-hydrofracking-issue-in-new-york.html. Courts in other states have been faced with similar cases; many of them have ruled in favor of the industry. *See* Jack Healy, *Heavyweight Response to Local Fracking Bans*, N.Y. TIMES, Jan. 3, 2015, *available at* http://www.nytimes.com/2015/01/04/us/heavyweight-response-to-local-fracking-bans.html?_r=0.

The Marcellus Shale is a

> [B]lack shale formation extending deep underground from Ohio and West Virginia northeast into Pennsylvania and southern New York. Although the Marcellus Shale is exposed at the ground surface in some locations in the northern Finger Lakes area, it is as deep as 7,000 feet or more below the ground surface along the Pennsylvania border in the Delaware River valley.[6]

Although the natural gas reserves in the Marcellus Shale have long been known,[7] the recent developments in gas well technology, particularly horizontal drilling and high-volume hydraulic fracturing, have brought the Marcellus Shale into the limelight as a potentially lucrative area for such activities.[8] Hydraulic fracturing, known colloquially as "hydrofacking," has generated a lot of public comment both for and against the process in the Marcellus Shale.[9] Hydrofracking involves

> pumping a fluid and a propping material such as sand down [a horizontal well] under high pressure to create fractures in the gas-bearing rock. The propping material (usually referred to as a "proppant") holds the fractures open, allowing more gas to flow into the well than would naturally . . . . Hydraulic fracturing technology is especially helpful for "tight" rocks like shale.[10]

Proponents of hydrofracking urged a variety of reasons including increased jobs, overall improved economic development, reduced heating

6. *Marcellus Shale*, N.Y. STATE DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/energy/46288.html (last visited Mar. 30, 2015).

7. Cornell Cooperative Extension, *History and Background: What is the Marcellus Shale?*, CORNELL UNIVERSITY (2005), *available at* http://cce.cornell.edu/EnergyClimateChange/NaturalGasDev/Documents/PDFs/History%20and%20Background1.pdf.

8. *Marcellus Shale*, *supra* note 6. Other developments include the proximity of high natural gas demand in New York, New Jersey, and New England markets and the construction of the Millennium Pipeline through the Southern Tier. *Id*. The Millennium pipeline in New York would carry natural gas from Independence in Steuben County, New York to Buena Vista in Rockland County, New York. *Millennium—New York's Hometown Pipeline*, MILLENNIUM PIPELINE CO., L.L.C., http://www.millenniumpipeline.com/.

9. *See, e.g.*, *Hydrofracking News*, SYRACUSE.COM, http://www.syracuse.com/hydrofracking/ (last visited Mar. 30, 2015); *HuffPost Fracking*, HUFFINGTONPOST, http://www.huffingtonpost.com/news/fracking/ (last visited Mar. 30, 2015); Michael Howard, *Mixed Emotion in Sullivan Co. Over Hydrofracking Decision*, TIME WARNER CABLE NEWS (Dec. 17, 2014, 7:31 PM), http://hudsonvalley.twcnews.com/content/news/793623/mixed-emotion-in-sullivan-co—over-hydrofracking-decision/#sthash.jNkza1n3.dpuf.

10. *Marcellus Shale*, *supra* note 6.

costs, cleaner fuel.[11] Opponents argue that the process is hazardous to health and the environment.[12]

While these arguments were swirling in the press,[13] the towns of Dryden and Middlefield in upstate New York took decisive action to ban hydrofracking in the face of efforts by developers to acquire from local landowners leases to explore and develop natural gas resources.[14]

The Town of Dryden in Thompkins County New York is, according to its comprehensive plan, a small rural town.[15] The goal of the Town's comprehensive plan and zoning ordinance is to preserve its small rural character.[16] Dryden also happens to be located in the Marcellus Shale region of the state.[17] The Town of Middlefield, which includes part of the Village of Cooperstown, is in Ostego County, New York, and is known for its agriculture and tourism.[18] It, like Dryden, has a master plan and zoning ordinance. Neither Dryden nor Middlefield were known for natural gas until developers came to Dryden in 2006 and to Middlefield in 2007 to "explore the possibility of developing natural gas resources through hydrofracking."[19]

Although both towns believed that their zoning ordinances prohibited gas extraction activities, they nevertheless took steps to clarify the issue.[20] The Dryden Town Board reviewed a number of scientific studies, held a public hearing, and on August 2011 voted to amend the zoning ordinance to prohibit "all oil and gas exploration, extraction and storage activities" in Dryden.[21] The Town of Middlefield took similar steps and in 2011 the Town Board voted unanimously to amend its master plan to classify "a range of heavy industrial uses, including oil, gas and solution mining and drilling, as prohibited uses."[22]

11. *See, e.g.*, David Bertola, *Hydrofracking proponents say NYS missing out*, THEMARCELLUSSHALE (Sept. 18, 2013, 9:38 AM), http://themarcellusshale.com/2013/09/18/hydrofracking-proponents-say-nys-missing/.

12. *See, e.g.*, *Hydrofracking*, CITIZENS CAMPAIGN FOR THE ENV'T, http://www.citizenscampaign.org/campaigns/hydro-fracking.asp (last visited Mar. 30, 2015).

13. *See, e.g.*, Revkin, *supra* note 3.

14. Wallach v. Town of Dryden, 23 N.Y.3d 728, 739-41, 16 N.E.3d 1188, 1191-93, 992 N.Y.S.2d 710, 713-15 (2014).

15. *Id.* at 739, 16 N.E.3d at 1192, 992 N.Y.S.2d at 714.

16. *Id.*

17. *Id.*

18. *Id.* at 741, 16 N.E.3d at 1193, 992 N.Y.S.2d at 715.

19. *Wallach*, 23 N.Y.3d at 741, 16 N.E.3d at 1193, 992 N.Y.S.2d at 715.

20. *Id.* at 740-41, 16 N.E.3d at 1192-93, 992 N.Y.S.2d at 714-15.

21. *Id.* at 740, 16 N.E.3d at 1192, 992 N.Y.S.2d at 714.

22. *Id.* at 741, 16 N.E.3d at 1193, 992 N.Y.S.2d at 715.

Thereafter, the predecessor to Norse Energy Corp. USA commenced Article 78 proceedings and declaratory judgment actions challenging the Town of Dryden's amendment[23] and Cooperstown Holstein Corporation ("CHC") commenced an Article 78 proceeding against Middlefield.[24] Each petitioner argued that the local government "lacked the authority to prohibit natural gas exploration and extraction activities because section 23-0303(2) of the Environmental Conservation Law ("ECL")—the supersession clause in the Oil, Gas and Solution Mining Law ("OGSML")—demonstrated that the State Legislature intended to preempt local zoning laws that curtailed energy production."[25] Dryden and Middlefield moved for summary judgment in the respective proceedings.[26] The supreme court granted Dryden summary judgment which was affirmed on appeal to the Third Department.[27] The Court of Appeals granted Norse Energy leave to appeal.[28] Middlefield also

23. On September 16, 2011, Anschutz Exploration Company, with leases covering about one-third of the town which it had obtained prior to the ban, commenced an Article 78 proceeding and an action for declaratory judgment against the Town asserting the now familiar argument that the town's ban on oil drilling was illegal. Anschutz Exploration Corp. v. Town of Dryden, 35 Misc. 3d 450, 453, 940 N.Y.S.2d 458, 461 (Sup. Ct. Tompkins Cnty. 2012). The court granted the town's motion for summary judgment. *Id.* at 471, 940 N.Y.S.2d at 473. Anschutz did not appeal; instead it apparently sold or transferred to Norse energy one of its leases, and Norse Energy prosecuted the appeal. *See* Norse Energy Corp. USA v. Town of Dryden, 108 A.D.3d 25, 28 & n.2, 964 N.Y.S.2d 714, 716 & n.2 (3d Dep't 2013). Norse Energy Corp. USA filed for bankruptcy protection and reorganization under Chapter 11 of the Bankruptcy Code on December 7, 2012. *NY gas driller Norse Energy files for Chapter 11*, TIMES UNION (Dec. 8, 2013, 7:17 PM), http://www.timesunion.com/news/article/NY-gas-driller-Norse-Energy-files-for-Chapter-11-4100868.php. On October 10, 2013, the bankruptcy court approved the conversion of the Chapter 11 to a Chapter 7 so that the company's assets could be liquidated. *See* Charlie Passut, *Norse Shifts to Chapter 7 Bankruptcy, Faces Liquidation*, SHALE DAILY (Oct. 18, 2013), http://www.naturalgasintel.com/articles/96121-norse-shifts-to-chapter-7-bankruptcy-faces-liquidation; Glenn Coin, *Norse Energy shutting down U.S. operations as New York hydrofracking moratorium continues*, SYRACUSE.COM (Oct. 17, 2013, 3:34 PM), http://www.syracuse.com/news/index.ssf/2013/10/norse_energy_were_leaving_new_york_because_we_cant_frack.html; *Norse Energy—What's Happening*, CMTY. ENVTL. DEF. COUNCIL, INC. (Oct. 22, 2013), http://www.cedclaw.org/news/norse-energy-whats-happening.

24. *Wallach*, 23 N.Y.3d at 741, 16 N.E.3d at 1193, 992 N.Y.S.2d at 715.

25. *Id.* at 740, 16 N.E.3d at 1193, 992 N.Y.S.2d at 715.

26. *Id.* at 740-41, 16 N.E.3d at 1193, 992 N.Y.S.2d at 715.

27. *Norse Energy Corp. USA*, 108 A.D.3d at 28, 38, 964 N.Y.S.2d at 716, 724.

28. Norse Energy Corp. USA v. Town of Dryden, 21 N.Y.3d 863, 995 N.E.2d 851, 972 N.Y.S.2d 535 (2013).

prevailed in the supreme court[29] and in the appellate division.[30] The Court of Appeals granted CHC leave to appeal.[31]

Norse Energy, through its Chapter 7 Trustee and CHC, argued to the Court that OGSML preempts the State's 932 towns from interfering with the creation of a state uniform energy policy contemplated by OGSML.[32] The Towns argued that the OGSML did not intend that the Towns forfeit their authority to enact zoning laws, which are the essence of a municipality's ability to restrict industrial uses to preserve the character of its community and protect its citizens' health and safety.[33] Over the dissent's objection,[34] the Court concluded that "the Towns have the better argument."[35]

To reach its decision, the Court reviewed several matters. These included the home rule authority of municipalities, the limitations which the State may impose on that authority, circumstances in which the State may preempt a local law, the Legislature's intent in enacting the supersession clause of the OGSML, and the three-part inquiry necessary to an analysis of the supersession clause as dictated by the Court's decision in *Frew Run Gravel Products, Inc. v. Town of Carroll*.[36]

The home rule authority of a municipality is found in Article IX of the New York State Constitution, the Municipal Home Rule Law, and the Town Law.[37]

Article IX provides that "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law . . . except to the extent that the legislature shall restrict the adoption of such a local law."[38]

The Municipal Home Rule Law which implements Article IX authorizes local governments to pass laws both for the "protection and

29. Cooperstown Holstein Corp. v. Town of Middlefield, 35 Misc. 3d 767, 780, 943 N.Y.S.2d 722, 730 (Sup. Ct. Otsego Cnty. 2012).

30. *See* Cooperstown Holstein Corp. v. Town of Middlefield, 106 A.D.3d 1170, 1170, 964 N.Y.S.2d 431, 432 (3rd Dep't 2013).

31. Cooperstown Holstein Corp. v. Town of Middlefield, 21 N.Y.3d 863, 995 N.E.2d 851, 972 N.Y.S.2d 535 (2013).

32. Wallach v. Town of Dryden, 23 N.Y.3d 728, 742, 16 N.E.3d 1188, 1193-94, 992 N.Y.S.2d 710, 715-16 (2014).

33. *Id.*

34. *Id.* at 755, 16 N.E.3d at 1203, 992 N.Y.S.2d at 725 (Pigott, J., dissenting).

35. *Id.* at 742, 16 N.E.3d at 1194, 992 N.Y.S.2d at 716.

36. *Id.* at 742-44, 16 N.E.3d at 1194-95, 992 N.Y.S.2d at 716-17 (citing Frew Run Gravel Prods., Inc. v. Town of Carroll, 71 N.Y.2d 126, 518 N.E.2d 920, 524 N.Y.S.2d 25 (1987)).

37. *See Wallach*, 23 N.Y.3d at 742-43, 16 N.E.3d at 1194, 992 N.Y.S.2d at 716.

38. N.Y. CONST. art. IX, § 2(c).

enhancement of [their] physical and visual environment"[39] and for the "government, protection, order, conduct, safety, health and well-being of persons or property therein."[40] The Town Law and Statute of Local Governments grant towns the power to adopt, amend, and repeal zoning regulations, and to enact zoning laws for the purpose of fostering "'the health, safety, morals, or the general welfare of the community.'"[41] The Court observed that the authority of a local government to regulate the use of land under its control is fundamental to its governance and reflected on its own precedent supporting that view.[42] While the State Constitution, State statutes, and case law protect the right of a local government to regulate land use, the Court also observed that this authority is not unlimited because municipal's action can be pre-empted by a contrary State law.[43] The Legislature's authority to enact State laws that respond to State concerns takes precedence.[44] Whether preemption of a land use law will occur as a result of the enactment of a State law depends on clear legislative intent expressed in the State law.[45]

This observation led the Court to examine the legislative intent of the OGSML. Petitioners based their argument for local laws' preemption on the language of the OGSML which provides: "[t]he provisions of this article . . . *shall supersede* all local laws or ordinances relating to the

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39. *Wallach*, 23 N.Y.3d 728, 742, 16 N.E.3d 1188, 1194, 992 N.Y.S.2d 710, 716 (2014) (alteration in original) (quoting N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(11) (McKinney 2014)).

40. *Id.* (internal quotation marks omitted).

41. *Id.* at 742, 16 N.E.3d at 1194, 992 N.Y.S.2d at 716 (quoting N.Y. TOWN LAW § 261 (McKinney 2014)).

42. *Id.* at 743, 16 N.E.3d at 1194, 992 N.Y.S.2d at 716 (citing DJL Rest. Corp. v. City of N.Y., 96 N.Y.2d 91, 96, 749 N.E.2d 186, 191, 725 N.Y.S.2d 622, 626 (2001) (upholding a city zoning ordinance regulating the location of adult entertainment establishments as not preempted by the Alcohol Beverage Control Law); Trs. of Union Coll. v. Members of Schenectady City Council, 91 N.Y.2d 161, 165, 690 N.E.2d 862, 864, 667 N.Y.S.2d 978, 980 (1997) (city ordinance excluding educational institutions from obtaining special use permits in historic district was unconstitutional); Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 682-83, 664 N.E.2d 1226, 1234-35, 642 N.Y.S.2d 164, 172-73 (1996) (town ordinance prohibiting mining was not preempted by the state's Mined Land and Reclamation Law); Udell v. Haas, 21 N.Y.2d 463, 469, 235 N.E.2d 897, 900, 288 N.Y.S.2d 888, 893 (1968) (zoning ordinance which reclassified landowner's property was ultra vires because it violated the town's comprehensive plan and was discriminatory in its effect on the landowner)).

43. *Id.* at 743, 16 N.E.3d at 1195, 992 N.Y.S.2d at 717.

44. *Wallach*, 23 N.Y.3d at 743, 16 N.E.3d at 1195, 992 N.Y.S.2d at 717 (quoting Albany Area Builders Ass'n v. Guilderland, 74 N.Y.2d 372, 377, 546 N.E.2d 920, 922, 547 N.Y.S.2d 627, 629 (1989)).

45. *Id.* (quoting *Gernatt Asphalt Prods.*, 87 N.Y.2d at 682, 664 N.E.2d at 1234, 642 N.Y.S.2d at 172).

regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law."[46]

The Court noted that the breadth of the intent expressed in the OGSML supersession clause must be examined in the context of *Frew Run*, which established a framework for identifying legislative intent to suppress a local law.[47] The three factors of the framework are: "(1) the plain language of the supersession clause; (2) the statutory scheme as a whole; and (3) the relevant legislative history."[48] The Court explained that *Frew Run* involved facts similar to *Wallach* and thus its holding was particularly important to the outcome of *Wallach.*[49] In *Frew Run,* a mining company challenged the prohibition of sand and mining operations in the Town of Carroll's local zoning district on the basis of the language in the statewide Mined Land Reclamation Law ("MLRL").[50] At the time, the statute provided that:

> "For the purposes stated herein, this title shall supersede all other state and *local laws relating to the extractive mining industry*; provided, however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein."[51]

In *Frew Run*, the Court concluded that the language "local laws relating to the extractive mining industry" did not include zoning laws.[52] In the Court's view, a town's zoning laws related to an entirely different subject, namely land use. Thus, according to the Court, local laws that purported to regulate the "how" of mining activities and operations were, in effect, preempted whereas those limiting "where" mining could take place were not.[53] The Court explained that its interpretation of the legislative intent behind the MLRL was "to prevent localities from

46. *Id.* at 744, 16 N.E.3d at 1195, 992 N.Y.S.2d at 717 (quoting N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney2014)).

47. *Id.* (citing Frew Run Gravel Prods., Inc. v. Carroll, 71 N.Y.2d 126, 518 N.E.2d 920, 524 N.Y.S.2d 25 (1987)).

48. *Id.*

49. *Wallach*, 23 N.Y.3d at 744, 16 N.E.3d at 1195, 992 N.Y.S.2d at 717.

50. *Id.*; *see Frew Run Gravel Prods., Inc.*, 71 N.Y.2d at 129, 518 N.E.2d at 921, 524 N.Y.S.2d at 26.

51. *Wallach*, 23 N.Y.3d at 744-45, 16 N.E.3d at 1195-96, 992 N.Y.S.2d at 717-18 (citation omitted).

52. *Id.* at 744-45, 16 N.E.3d at 1196, 992 N.Y.S.2d at 718.

53. *Id.* at 745, 16 N.E.3d at 1196, 992 N.Y.S.2d at 718 (citing *Frew Run*, 71 N.Y.2d at 131, 518 N.E.2d at 922, 524 N.Y.S.2d at 27-28).

enacting ordinances 'dealing with the actual operation and process of mining' because such laws would 'frustrate the statutory purpose of encouraging mining through standardization of regulations pertaining to mining operations.'"[54] Under this interpretation of the statute's intent, zoning laws were outside the preemptive intent because "nothing in the Mined Land Reclamation Law or its history . . . suggests that its reach was intended to be broader than necessary to preempt conflicting regulations dealing with mining operations and reclamation of mined lands."[55] Given the Court's perspective in *Frew Run*, it is easy to see, in retrospect, how it would come to its conclusion in *Wallach.*

As to the plain language of OGSML providing for the preemption of "all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries,"[56] the Court concluded that its similarity to that of the Mined Land Reclamation Law suggested that the broader interpretation sought by petitioners was untenable.[57]

The Court declined to adopt petitioners' view that the second clause of the preemption language providing that OSMGL "shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law" necessitated a broader interpretation of "regulation of the oil, gas and solution mining industries" to preempt local zoning laws.[58] The Court viewed the secondary clause as an exception to the constraint on regulation of industry activities by preserving the local jurisdiction to address the heavy traffic associated with hydrofracking, and the taxes on oil and gas production permitted by the real property tax law, because neither involve the location of the business.[59] Consistent with its interpretation of the legislative intent of OGSML, the Court pointed out that had the Legislature intended to preempt local zoning laws, it could have done so as it had in other legislation.[60]

54. *Id.* (quoting *Frew Run*, 71 N.Y.2d at 133, 518 N.E.2d at 923, 524 N.Y.S.2d at 29).

55. *Id.* at 745-46, 16 N.E.3d at 1196, 992 N.Y.S.2d at 718 (alteration in original) (quoting *Frew Run*, 71 N.Y.2d at 133, 518 N.E.2d at 923, 524 N.Y.S.2d at 29).

56. *Wallach*, 23 N.Y.3d at 744, 16 N.E.3d at 1195, 992 N.Y.S.2d at 717 (quoting N.Y. ENVTL. CONSERV. LAW § 23-0303(2)).

57. *Id.* at 746, 16 N.E.3d at 1197-98, 992 N.Y.S.2d at 718-19.

58. *Id.* at 744, 746-47, 16 N.E.3d at 1195, 1197, 992 N.Y.S.2d at 717, 719.

59. *Id.* at 747, 16 N.E.3d at 1197, 992 N.Y.S.2d at 719.

60. *Id.* at 747-48, 16 N.E.3d at 1197-98, 992 N.Y.S.2d at 719-20 (quoting N.Y. ENVTL. CONSERV. LAW § 27-1107 ("[P]rohibiting municipalities from requiring 'any approval, consent, permit, certificate or other condition including conformity with local zoning or land use laws and ordinances' for the siting of hazardous waste facilities."); N.Y. MENTAL HYG. LAW § 41.34(f) (McKinney 2014) ("A community residence established pursuant to this

As to the overall statutory scheme, the second *Frew Run* factor, the Court concluded that the purpose of the OGSML was oversight of the "safety, technical and operational aspects of oil and gas activities across the State," thus leading to its interpretation of the supersession clause as one designed to preempt local government intrusion on the operations of oil and gas activities, not their location.[61]

Lastly, as to the third *Frew Run* factor, the legislative history, the Court explained the history of the OGSML and its predecessor statutes shows they were designed to encourage the development of oil and gas resources in the State while preventing waste.[62] They do not mention zoning, nor does their history explain the supersession clause, so the Court concluded that there was no source which undermined its interpretation of the supersession clause.[63]

Trying to hang on to a slender thread, petitioners asked the Court to distinguish between a complete ban and a partial ban, arguing that the Dryden and Middlefield bans on any hydrofracking were nothing other than an invalid local law regulating the industry, but that a partial restriction in certain residential areas of a town could survive the preemption supersession clause because it was in keeping with a zoning intent.[64] The Court was quick to respond that its decision in *Gernatt Asphalt Products* precluded that argument.[65]

A mining company in *Gernatt Asphalt Products* challenged the Town of Sardinia's amendment to its zoning ordinance eliminating all mining as a permitted use throughout the Town after the *Frew Run* holding was added as an amendment to the MLRL's supersession

section and family care homes shall be deemed a family unit, for the purposes of local laws and ordinances."); N.Y. RACING, PARI-MUTUEL WAGERING & BREEDING LAW § 1366 (McKinney Supp. 2014) ("Notwithstanding any inconsistent provision of law, gaming authorized at a location pursuant to this article shall be deemed an approved activity for such location under the relevant city, county, town, or village land use or zoning ordinances, rules, or regulations.").

61. *Wallach*, 23 N.Y.3d at 750, 16 N.E.3d at 1199, 992 N.Y.S.2d at 721.

62. *Id.* at 751, 16 N.E.3d at 1200, 992 N.Y.S.2d at 722. Starting in 1941 with OGSML's predecessor statute, the Interstate Compact to Conserve Oil and Gas, to the 1963 enactment of section 70 and following of the former Conservation Law, to OGSML, the emphasis of the statutes has been on creating a framework for the development of natural resources of oil and gas and the prevention of waste of such resources. *Id.* (citing N.Y. ENVTL. CONSERV. LAW § 23-2101).

63. *Id.* at 753, 16 N.E.3d at 1201, 992 N.Y.S.2d at 723.

64. *Id.* at 753, 16 N.E.3d at 1202, 992 N.Y.S.2d at 724.

65. *Wallach*, 23 N.Y.3d at 753, 16 N.E.3d at 1202, 992 N.Y.S.2d at 724 (citing Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 664 N.E.2d 1226, 642 N.Y.S.2d 164 (1996)).

clause.[66] The Court was unreceptive to petitioners' argument that "municipalities [had] limited authority to determine in which zoning districts mining may be conducted but not the authority to prohibit mining in all zoning districts."[67]

The Court in *Wallach* repeated its holding from *Gernatt Asphalt Products* for the benefit of the *Wallach* petitioners:

> A municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole.[68]

The Court advised petitioners that the Towns had acted reasonably within their zoning authority and thus the petitioners' "position that the town-wide nature of the hydrofracking bans rendered them unlawful [was] without merit, as [were] their remaining contentions."[69]

The Court observed that its opinion was not about the benefits or harm of hydrofracking (about which it was remaining neutral) but rather about the relationship between the State and local governments.[70] As to that relationship:

> [I]n light of ECL 23-0303 (2)'s plain language, its place within the OGSML's framework and the legislative background, we cannot say that the supersession clause—added long before the current debate over high-volume hydrofracking and horizontal drilling ignited—evinces a clear expression of preemptive intent. The zoning laws of Dryden and Middlefield are therefore valid.[71]

The dissent was critical of the majority's interpretation of the particular zoning ordinances at issue, viewing them as nothing more than a pretext for banning the hydrofracking industry and an encroachment on the authority of the Department of Environmental Conservation

66. *Id.*; *see* Act of June 12, 1991, ch. 166, § 228, 1991 N.Y. Laws 2562 (specifically allowing laws of general applicability and zoning ordinances while prohibiting any local laws that purport to regulate state controlled mining and reclamation) (codified as amended at N.Y. ENVTL. CONSERV. LAW § 23-2703(2)(a)-(b)); *see Gernatt Asphalt Prods.*, 87 N.Y.2d at 683, 664 N.E.2d at 1235, 642 N.Y.S.2d at 173.

67. *Wallach*, 23 N.Y.3d at 753, 16 N.E.3d at 1202, 992 N.Y.S.2d at 724 (emphasis deleted) (quoting *Gernatt Asphalt Prods.*, 87 N.Y.2d at 681, 664 N.E.2d at 1234, 642 N.Y.S.2d at 172).

68. *Id.* at 754, 16 N.E.3d at 1202, 992 N.Y.S.2d at 724 (quoting *Gernatt Asphalt Prods.*, 87 N.Y.2d at 684, 664 N.E.2d at 1235, 642 N.Y.S.2d at 173).

69. *Id.*

70. *Id.*

71. *Id.* at 755, 16 N.E.3d at 1203, 992 N.Y.S.2d at 725.

("DEC").[72] The dissent focused on the language of the Dryden and Middlefield bans, which provided details about "prohibitions against the storage of gas, petroleum exploration and production materials and equipment in the respective towns," matters the dissent saw as efforts to regulate the industry, thus subjects for the DEC's regulation, and thus running afoul of the supersession clause.[73]

B. Ultra Vires and New York City Soft Drinks Ban

Faced with concerns about the rising level of obesity,[74] the New York City Board of Health[75] adopted the "Sugary Drink Portion Cap Rule" on September 13, 2012.[76] The rule prohibited the sale in New York City of sugary drinks[77] in containers which could hold greater than sixteen fluid ounces.[78] The rule regulated sales by restaurants, street carts

72. *Wallach*, 23 N.Y.3d at 755-56, 16 N.E.3d at 1203-04, 992 N.Y.S.2d at 725-26 (Pigott, J., dissenting).

73. *Id.* at 756, 16 N.E.3d at 1204, 992 N.Y.S.2d at 726 (Pigott, J., dissenting).

74. Michael M. Grynbaum, *Health Panel Approves Restriction on Sale of Large Sugary Drinks*, N.Y. TIMES (Sept. 13, 2012), http://www.nytimes.com/2012/09/14/nyregion/health-board-approves-bloombergs-soda-ban.html; *see generally* Kara Marcello, Note, *The New York City Sugar-Sweetened Beverage Portion Cap Rule: Lawfully Regulating Public Enemy Number One in the Obesity Epidemic*, 46 CONN. L. REV. 807, 812-17 (2013) (discussing the role of sugar sweetened drinks in the rise of obesity).

75. "New York City Board of Health is part of the City's Department of Health and Mental Hygiene and consists of the Commissioner of that Department, the Chairperson of the Department's Mental Hygiene Advisory Board, and nine other members, appointed by the Mayor." N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene (*Hispanic Chambers of Commerce III*), 23 N.Y.3d 681, 690, 16 N.E.3d 538, 541, 992 N.Y.S.2d 480, 483 (2014).

76. *Id.*

77. The drink subject to the cap rule is described as a non-alcoholic beverage that "is sweetened by the manufacturer or establishment with sugar or another caloric sweetener; . . . has greater than 25 calories per 8 fluid ounces of beverage; and . . . does not contain more than 50 percent of milk or milk substitute by volume as an ingredient." N.Y.C. HEALTH CODE, 24 R.C.N.Y. § 81.53(a)(1) (2014).

78. *Hispanic Chambers of Commerce III*, 23 N.Y.3d at 690, 16 N.E.3d at 541, 992 N.Y.S.2d at 483 (quoting N.Y.C. HEALTH CODE, 24 R.C.N.Y. § 81.53(3)(b)). The rule was proposed verbatim to the board by the Mayor's Office. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene (*Hispanic Chambers of Commerce I*), No. 653584/12, 2013 N.Y. Slip Op. 30609(U), at 5 (Sup. Ct. N.Y. Cnty. 2013). The source of the rule was noted by the First Department as demonstrating the lack of any special expertise in its development. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene (*Hispanic Chambers of Commerce II*), 110 A.D.3d 1, 16, 970 N.Y.S.2d 200, 212-13 (1st Dep't 2013). The rule was enacted after notice and a public hearing. *Hispanic Chambers of Commerce III*, 23 N.Y.3d at 690, 16 N.E.3d at 541, 992 N.Y.S.2d at 483.

and movie theaters,[79] but not sales by supermarkets and convenience stores, which are regulated by the New York State Department of Agriculture and Markets.[80] The penalty for a violation of the rule was "a fine of no more than two hundred dollars for each violation and no more than one violation of this section may be cited at each inspection."[81] The rule was very controversial and had been vehemently opposed by the soft drink industry.[82] Ultimately, the rule was challenged in a hybrid Article 78 and declaratory judgment proceeding brought by several national and state organizations in *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene* (*Hispanic Chambers of Commerce III*).[83] The case involved the issue of whether the New York City Board of Health exceeded its authority in adopting the Sugary Drinks Portion Cap Rule.[84] The petitioners' argument was twofold: first, the rule was ultra vires, violating the City Board of Health's rulemaking authority; and two, the rule was arbitrary and capricious.[85]

A rule enacted ultra vires is a classic ground available for challenging agency actions and rules as illegal.[86] An agency's promulgation of a rule cannot exceed the authority granted under its enabling legislation.[87] In determining whether the rule exceeded the agency's authority, courts generally will defer to an agency's interpretation of its enabling legislation and those statutes which it is charged with implementing, provided the interpretation is reasonable.[88]

79. Grynbaum, *supra* note 74.

80. *Hispanic Chambers of Commerce III*, 23 N.Y.3d at 691, 16 N.E.3d at 541-42, 992 N.Y.S.2d at 483-84.

81. N.Y.C. HEALTH CODE, 24 R.C.N.Y. § 81.53(3)(d).

82. Grynbaum, *supra* note 74.

83. *Hispanic Chambers of Commerce III*, 23 N.Y.3d at 691, 16 N.E.3d at 542, 992 N.Y.S.2d at 484. Petitioners included the New York Statewide Coalition of Hispanic Chambers of Commerce, the New York Korean-American Grocers Association, Soft Drink and Brewery Workers Union, Local 812, International Brotherhood of Teamsters, the American Beverage Association, the National Association of Theatre Owners of New York State, and the National Restaurant Association. *Hispanic Chambers of Commerce I*, 2013 N.Y. Slip Op. 30609(U), at 1.

84. *Hispanic Chambers of Commerce III*, 23 N.Y.3d at 691, 16 N.E.3d at 542, 992 N.Y.S.2d at 484.

85. *Id.* at 703, 16 N.E.3d at 551, 992 N.Y.S.2d at 493.

86. PATRICK J. BORCHERS & DAVID L. MARKELL, N.Y. STATE ADMIN. PROCEDURE AND PRACTICE § 8.3 (2d ed. 1998).

87. *See* Boreali v. Axelrod, 71 N.Y.2d 1, 6, 517 N.E.2d 1350, 1351, 523 N.Y.S.2d 464, 466 (1987) (noting that Public Health Council had overstepped its boundaries as set by its enabling statute).

88. BORCHERS & MARKELL, *supra* note 86.

Where, however, interpretation does not involve an agency's special expertise, the court need not defer to the agency's interpretation.[89] The most noteworthy New York State case involving a determination that an agency acted ultra vires is *Boreali v. Axelrod*, holding that the New York State Public Health Council overstepped its regulatory authority when it adopted regulations that prohibited smoking in a wide variety of indoor public areas: prohibitions that had previously been considered, but not adopted, by the State Legislature.[90] *Boreali* was considered an important decision about rulemaking.[91] *Boreali* articulated four considerations to be used in determining whether an agency had acted ultra vires, namely, crossing the "difficult-to-define line between administrative rule-making and legislative policy-making."[92] The Court noted that when these factors coalesce, the line has been crossed.[93] These factors which are to be considered in their totality are: (1) whether the action taken was a uniquely legislative function, namely, weighing economic and social issues; (2) whether the agency was acting on a clean slate or filling in blanks in existing law; (3) whether previous or current legislative debate on the subject area existed; and (4) whether the action required specific agency expertise and technical competence.[94]

All three courts reviewing the Board of Health's adoption of the Sugary Drinks Portion Cap Rule were guided by the *Boreali* factors, and all three courts reached the same conclusion. The dissent at the Court of Appeals felt their approach was a rather lock-step analysis leaving no room for a more flexible analysis.[95] Of course, the presence of a four-factor test that invites a less flexible approach can be very appealing, but finding that an agency has dabbled in a legislative approach rather than in filling in the blanks of an already existing statute is rare, given the breadth of most legislative enactments which guide agencies.[96]

The supreme court held that the rule was ultra vires based on the factors articulated in *Boreali*.[97] It rejected the law-making authority of the

89. *See Boreali*, 71 N.Y.2d at 14, 517 N.E.2d at 1356, 523 N.Y.S.2d at 471.

90. *Id.* at 6, 517 N.E.2d at 1351, 523 N.Y.S.2d at 466.

91. *See*, *e.g.*, Bernard Schwartz, *Administrative Law Cases During 1991*, 44 ADMIN. L. REV. 629, 648-49 (1992).

92. *Boreali*, 71 N.Y.2d at 11, 517 N.E.2d at 1355, 523 N.Y.S.2d at 469.

93. *Id.*

94. *Id.* at 11-14, 517 N.E.2d at 1355-56, 523 N.Y.S.2d at 469-71.

95. *See infra* pp. 622-24 and accompanying notes.

96. BORCHERS & MARKELL, *supra* note 86, § 8.3.

97. *Hispanic Chambers of Commerce III*, 23 N.Y.3d 681, 691, 16 N.E.3d 538, 542, 992 N.Y.S.2d 480, 484 (2014) (citing *Hispanic Chambers of Commerce I*, No. 653584/12, 2013 N.Y. Slip Op. 30609(U), at 11-34 (Sup. Ct. N.Y. Cnty. 2013)).

Board of Health as alleged by the respondents.[98] The court also concluded that while the cap rule had a reasonable basis, namely the curbing of obesity,[99] it was nevertheless arbitrary and capricious because "it applies to some but not all food establishments in the City, [and] it excludes other beverages that have significantly higher concentrations of sugar sweeteners and/or calories" on suspect grounds.[100]

The First Department affirmed the supreme court's determination, both that the Board of Health did not have law-making authority and that the Board of Health exceeded its authority based on the *Boreali* factors.[101] The appellate division did not discuss the issue of whether the rule was arbitrary and capricious.[102] The Court of Appeals granted respondents leave to appeal.[103]

The Court of Appeals then affirmed the decision of the appellate division.[104] As had been the case with the lower courts, the Court concluded that the Board of Health did not have law making authority and thus the Sugary Drinks Portion Cap Rule was an ultra vires act by the Board of Health based on the *Boreali* considerations.[105]

As to the authority of the Board of Health, the City argued that the board was a unique agency.[106] The Court acknowledged that the Charter of the Board is broad, namely, to "embrace in the health code all matters and subjects to which the power and authority of the [Department of Health and Mental Hygiene] extends"[107] and that it can "add to and alter, amend or repeal any part of the health code."[108] While the breadth of the Board's authority was undeniable, and, indeed, the Court had on occasion

98. *Id.*

99. *Id.* (citing *Hispanic Chambers of Commerce I*, 2013 N.Y. Slip Op. 30609(U), at 35).

100. *Id.* (alteration in original) (quoting *Hispanic Chambers of Commerce I*, 2013 N.Y. Slip Op. 30609(U), at 35).

101. *Id.* at 692, 16 N.E.3d at 542, 992 N.Y.S.2d at 484 (citing *Hispanic Chambers of Commerce II*, 110 A.D.3d 1, 16, 970 N.Y.S.2d 200, 212-13 (1st Dep't 2013)).

102. *Hispanic Chambers of Commerce III*, 23 N.Y.3d at 692, 16 N.E.3d at 542, 992 N.Y.S.2d at 484.

103. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 22 N.Y.3d 853, 853, 998 N.E.2d 1072, 1072, 976 N.Y.S.2d 447, 447 (2013).

104. *Hispanic Chambers of Commerce III*, 23 N.Y.3d at 701, 16 N.E.3d at 549, 992 N.Y.S.2d at 491.

105. *Id.* at 696, 701, 16 N.E.3d at 545, 549, 992 N.Y.S.2d at 487, 491.

106. *Id.* at 694, 16 N.E.3d at 544, 992 N.Y.S.2d at 486.

107. *Id.* (alteration in original) (quoting N.Y.C. Charter § 558(c) (2002)).

108. *Id.* (quoting N.Y.C. Charter § 558(b)).

described it as legislative in nature,[109] nevertheless, the Court could find no suggestion in the City Charter that the Board of Health was authorized "to create laws."[110] It pointed out that the Board's authority was clarified by an amendment in 1979 "to ensure that the Board of Health [did] not regulate too broadly."[111] The City's view of the Board's authority found a receptive audience in the dissent[112] but its view did not carry the day.

The Court then turned to an analysis of the *Boreali* factors.[113] It found that the rule entered the legislative realm because it was rife with exceptions based on social and economic concern not related to health issues of obesity.[114] According to the Court, it was obvious that:

> [T]he Portion Cap Rule embodied a compromise that attempted to promote a healthy diet without significantly affecting the beverage industry. This necessarily implied a relative valuing of health considerations and economic ends, just as a complete prohibition of sugary beverages would have. Moreover, it involved more than simply balancing costs and benefits according to preexisting guidelines; the value judgments entailed difficult and complex choices between broad policy goals—choices reserved to the legislative branch.[115]

In making these choices according to the Court, the Board of Health "engaged in law-making beyond its regulatory authority."[116]

The Court concluded that the Board's interpretation of its authority was not worthy of deference because it could not show that its actions under the second *Boreali* factor involved filling the interstices of the law.[117] There was no legislation either at the State or City level that involved consumption of sugary beverages.[118] According to the Court, the Board of Health did not have any legislative guidance, and thus, as

109. *Hispanic Chambers of Commerce III*, 23 N.Y.3d at 695-96, 16 N.E.3d at 545, 992 N.Y.S.2d at 487 (citing Grossman v. Baumgartner, 17 N.Y.2d 345, 351, 218 N.E.2d 259, 262, 271 N.Y.S.2d 195, 199 (1966); Schulman v. N.Y.C. Health & Hosps. Corp., 38 N.Y.2d 234, 237, 342 N.E.2d 501, 502, 379 N.Y.S.2d 702, 703 n.1 (1975)); *see also id.* at 702, 16 N.E.3d at 549-50, 992 N.Y.S.2d at 491-92 (Abdus-Salaam, J., concurring).

110. *Hispanic Chambers of Commerce III*, 23 N.Y.3d at 694, 16 N.E.3d at 544, 992 N.Y.S.2d at 486.

111. *Id.* at 694, 16 N.E.3d at 544-45, 992 N.Y.S.2d at 486-87.

112. *See infra* pp. 622-23 and accompanying notes.

113. *Hispanic Chambers of Commerce III*, 23 N.Y.3d at 696, 16 N.E.3d at 545-46, 992 N.Y.S.2d at 487-88.

114. *Id.* at 697-98, 16 N.E.3d at 546-47, 992 N.Y.S.2d 488-89.

115. *Id.* at 698, 16 N.E.3d at 547, 992 N.Y.S.2d at 489.

116. *Id.* at 699, 16 N.E.3d at 547, 992 N.Y.S.2d at 489.

117. *Id.* at 700, 16 N.E.3d at 548, 992 N.Y.S.2d at 490.

118. *Hispanic Chambers of Commerce III*, 23 N.Y.3d at 699-700, 16 N.E.3d at 548, 992 N.Y.S.2d at 490.

was the case with the first *Boreali* factors, it was making policy.[119] The Court also concluded that the Board was intervening in a legislative debate over how to limit access to sugary beverages[120] that had been described by the appellate division simmering both in the City Council and the New York State Legislature, and all efforts at legislation had failed.[121]

Lastly, the Court observed that it need not reach a discussion of the fourth *Boreali* factor, the specialized expertise of the agency, because the central theme of *Boreali*, namely, as agency involved in policy making rather than implementing a pre-existing policy choice by a legislative body had been demonstrated by the Board of Health's action.[122] Although the fact that the rule had been proposed verbatim by the Mayor's Office might be considered a troubling element of the process, the appellate division had merely noted that no agency expertise was involved.[123] The Court of Appeals elegantly responded to that element of *Boreali* by noting that "[h]ere, regardless of who or which arm of government first proposed or drafted the Portion Cap Rule, and regardless of whether the Board exercised its considerable professional expertise or merely rubber-stamped a rule drafted outside the agency, the Portion Cap Rule is invalid under *Boreali*."[124]

The concurring opinion noted that it fully supported the majority decision and wrote to point out that the decision was "carefully circumscribed" and not, as the dissent argued, a "departure from existing precedent."[125] Nor did the concurring opinion believe that the application of *Boreali* was as rigid as the dissent criticized it.[126]

The dissent began with an analysis of the Board's history.[127] Based on its view that over time the Board was recognized to have broad powers and independence, particularly demonstrated by the authority to create, amend, and enforce the Sanitary Code,[128] and the Court's own

119. *Id.* at 700, 16 N.E.3d at 548, 992 N.Y.S.2d at 490.

120. *Id.*

121. *Id.* at 692, 16 N.E.3d at 543, 992 N.Y.S.2d at 485.

122. *Id.* at 700-01, 16 N.E.3d at 549, 992 N.Y.S.2d at 491.

123. *Hispanic Chambers of Commerce III*, 23 N.Y.3d at 693, 16 N.E.3d at 543, 992 N.Y.S.2d at 485 (citing *Hispanic Chambers of Commerce II*, 110 A.D.3d 1, 15, 970 N.Y.S.2d 200, 212-13 (1st Dep't 2013)).

124. *Id.* at 701, 16 N.E.3d at 549, 992 N.Y.S.2d at 491.

125. *Id.* at 701-02, 16 N.E.3d at 549-50, 992 N.Y.S.2d at 491-92 (Abdus-Salaam, J., concurring).

126. *Id.* at 702, 16 N.E.3d at 549, 992 N.Y.S.2d at 491 (Abdus-Salaam, J., concurring).

127. *Id.* at 702-05, 16 N.E.3d at 550-52, 992 N.Y.S.2d at 492-94 (Read, J., dissenting).

128. *Hispanic Chambers of Commerce III*, 23 N.Y.3d at 707, 16 N.E.3d at 553, 992

recognition of the Board of Health's authority as "legislative,"[129] the dissent observed that the Board's regulatory hand should not be stayed.[130] It then criticized the Court's treatment of the *Boreali* factors as a lock-step analysis rather than using a flexible approach.[131] Moving on to the final argument, rationality, the dissent adopted the same argument the dissent had made in *Boreali*[132]: "a rule is not irrational because there are reasons to disagree with or ways to improve it, or because it does not completely solve the targeted problem."[133] Moreover, the dissent noted that two questions are raised by the majority's analysis. The first issue is whether *Boreali* is even applicable given that *Boreali* involved a separation of powers issue involving State government, not a local government, and, if, as the majority has concluded it is, the majority decision is a major step with possible unforeseen consequences.[134] The second issue is how can an agency do the necessary balancing of factors to create rules if such balancing runs afoul of *Boreali.*[135]

N.Y.S.2d at 495 (Read, J., dissenting); *compare* N.Y.C. Charter § 558(b) ("The board of health from time to time may add to and alter, amend or repeal any part of the health code, and may therein publish additional provisions for security of life and health in the city and confer additional powers on the department not inconsistent with the constitution, laws of this state or this charter, and may provide for the enforcement of the health code or any orders made by the commissioner or the board of health, by such fines, penalties, forfeitures . . . .") *with* N.Y. PUB. HEALTH LAW § 225 (McKinney 2014) (the provision at issue in *Boreali*: "The public health and health planning council shall have power by the affirmative vote of a majority of its members to establish, and from time to time, amend and repeal sanitary regulations, to be known as the sanitary code of the state of New York, *subject to approval by the commissioner.*" (emphasis added)). The additional requirement of Commission approval of the changes to the State Sanitary Code at issue in *Boreali* is an interesting contrast to the N.Y.C. Charter provision regarding the City's Board of Health.

129. *Hispanic Chambers of Commerce III*, 23 N.Y.3d at 707-08, 16 N.E.3d at 554-55, 992 N.Y.S.2d at 495-96 (Read, J., dissenting) (quoting People *ex rel.* Yonofsky v. Blanchard, 288 N.Y. 145, 147, 42 N.E.2d 7, 8 (1942)) ("The Sanitary Code (now the Health Code) may, therefore, 'be taken to be a body of administrative provisions sanctioned by a time-honored exception to the principle that there is to be no transfer of the authority of the Legislature.'").

130. *Id.* at 704, 16 N.E.3d at 551, 992 N.Y.S.2d at 493 (Read, J., dissenting).

131. *Id.* at 712, 16 N.E.3d at 557, 992 N.Y.S.2d at 499 (Read, J., dissenting).

132. *See infra* note 135 and accompanying parenthetical text.

133. *Hispanic Chambers of Commerce III*, 23 N.Y.3d at 717, 16 N.E.3d at 560, 992 N.Y.S.2d at 502 (Read, J., dissenting) (citation omitted).

134. *Id.* at 714, 16 N.E.3d at 558, 992 N.Y.S.2d at 500 (Read, J., dissenting) (citing Boreali v. Axelrod, 71 N.Y.2d 1, 9, 517 N.E.2d 1350, 1353, 523 N.Y.S.2d 464, 467-68 (1987)).

135. *Id.* at 715, 16 N.E.3d at 559, 992 N.Y.S.2d at 501 (Read, J., dissenting). The dissent in *Boreali* likely could not agree more. *See Boreali*, 71 N.Y.2d at 19, 517 N.E.2d at 1359-60, 523 N.Y.S.2d at 474 (Bellacosa, J., dissenting) ("No decision of this court and no relevant administrative law principle have been found where general rule-making power was nullified by a court because exceptions to the rule were also promulgated by the regulating

C. State Comptroller's Audit Authority

The issue before the Court in *Handler v. DiNapoli* was whether the New York State Comptroller was constitutionally prohibited from auditing private medical providers whose patients were insured by the Empire Plan, the primary coverage option of the New York State Health Insurance Program ("NYSHIP").[136] NYSHIP provides health insurance coverage for State and local government employees, retirees and their dependents.[137] Although petitioners South Island Orthopedic Group and the individual physicians Handler and Moschetto conceded that New York State pays 80% of their services,[138] they nevertheless challenged the authority of the State Comptroller who is charged with oversight of the State's finances[139] to audit their records.[140] They claimed that they had no contract with the State and did not receive State funds and thus were not subject to the Comptroller's authority.[141] Essentially they argued that the monies lost their "public nature" once they were received by petitioners.[142] Petitioners were non-participating providers in the Empire Plan. The Department of Civil Service contracted with United Healthcare Insurance Company of New York to process Empire Plan claims and United, in turn, pays a portion of fees charged by non-participating

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entity in response to ancillary social, economic or even policy factors. The majority argument in this respect seems to assert that the PHC was too reasonable and too forthright, and that what it perhaps should have done was create an absolute ban on indoor smoking expressly and pristinely premised on public health concerns. Life and government are not so neatly categorized. Surely, if the greater power exists, the lesser, as responsibly exercised here, should not be forbidden!").

136. 23 N.Y.3d 239, 242, 13 N.E.3d 653, 654, 990 N.Y.S.2d 153, 154 (2014), *rev'g* 88 A.D.3d 1187, 932 N.Y.S.2d 204 (3d Dep't 2011). The identical issue was presented in *South Island Orthopedic Group, P.C. v. DiNapoli*. 88 A.D.3d 1186, 1186, 931 N.Y.S.2d 542, 542 (3d Dep't 2011). Consequently, the two cases were decided together in the First Department and heard by the Court of Appeals under the case title *Handler*. Handler v. DiNapoli (*Handler I*), 23 N.Y.3d 239, 242, 13 N.E.3d 653, 654, 990 N.Y.S.2d 153, 154 (2014).

137. *Handler I*, 23 N.Y.3d at 242-43, 13 N.E.3d at 654, 990 N.Y.S.2d at 154.

138. *Id.* at 242, 13 N.E.3d at 654, 990 N.Y.S.2d at 154.

139. The audit was performed pursuant to the State Comptroller's authority under Article V, section 1 of the State Constitution and Article II, section 8 of the State Finance Law. OFFICE OF THE N.Y. STATE COMPTROLLER, UNITED HEALTHCARE: NEW YORK STATE HEALTH INSURANCE PROGRAM—OVERPAYMENTS FOR SERVICES PROVIDED BY SOUTH ISLAND ORTHOPEDIC GROUP, PC, REPORT 2008-S-173 (2009), *available at* http://osc.state.ny.us/audits/allaudits/093009/08s173.pdf.

140. *Handler I*, 23 N.Y.3d at 242, 13 N.E.3d at 654, 990 N.Y.S.2d at 154.

141. *Id.* at 245, 13 N.E.3d at 656, 990 N.Y.S.2d at 156.

142. *See* Handler v. DiNapoli (*Handler II*), 88 A.D.3d 1187, 1190, 932 N.Y.S.2d 204, 206 (3d Dep't 2011).

providers directly to members.[143]

The Comptroller audited United because he was concerned that the non-participating providers had waived the members' required out-of-pocket costs for services provided and thus had driven up the cost of the claims processed by United.[144] According to the Comptroller's Audit report, "the waiver of members' out-of-pocket costs tends to drive up costs for the Empire Plan, because it increases the likelihood that members will use non-participating providers, such as South Island. Non-participating providers generally receive higher fee rates than participating providers receive."[145] The audit report illustrates what transpired with the following example:

> In submitting claims, South Island routinely reported the full base amounts for services and did not reduce them by the amounts of members' out-of-pocket costs that were waived. For example, South Island charged $125 for services provided to an Empire member. United paid $100 (80 percent of $125) and South Island accepted that payment as payment in full, waiving $25 of their fee. Therefore, South Island's actual charge was $100. United should have paid $80 (80 percent of $100), resulting in a $20 overpayment.[146]

The Comptroller's audit found that United had overpaid claims as a result of the waiver practice and determined that United should seek recoupment of the overpayment from petitioner South Island and make the necessary changes to ensure that overpayments did not occur in the future.[147]

143. OFFICE OF THE N.Y. STATE COMPTROLLER, *supra* note 139, at 9-13 ("To limit its costs (and those of the State), United pays non-participating provider claims the lesser of 'reasonable and customary' rates for the services provided or the actual amount claimed by the provider. In most instances, payments to non-participating providers are based on reasonable and customary rates. However, reasonable and customary rates are generally more than the rates paid to participating providers.").

144. *Id.* at 13-14.

145. *Id.* at 7.

146. *Id.* at 13-14. "The amount sought in the claim for services is, thus, artificially inflated when co-payments are routinely waived, causing overpayment by United and the state . . . ." *Handler II*, 88 A.D.3d at 1188, 932 N.Y.S.2d at 205 (citing Co-payment & Deductible Waivers, Ops. Gen. Counsel N.Y. Ins. Dep't No. 05-04-07 (2005); Waiver of Co-Payments, Ops. Gen. Counsel N.Y. Ins. Dep't No. 04-02-25 (2004); Non-participating Healthcare Provider; Balance Billing, Ops. Gen. Counsel N.Y. Ins. Dep't No. 03-04-09 (2003)).

147. OFFICE OF THE N.Y. STATE COMPTROLLER, UNITED HEALTHCARE: NEW YORK STATE HEALTH INSURANCE PROGRAM—OVERPAYMENTS FOR SERVICES PROVIDED BY DR. HANDLER AND DR. MOSCHETTO, REPORT 2009-S-23, 7-8 (2009), *available at* http://osc.state.ny.us/audits/allaudits/093010/09s23.pdf.

The Comptroller's audit of the practice of Drs. Handler and Moschetto reached the same result. "[T]he practice of Dr. Handler and Dr. Moschetto, a non-participating provider, routinely waived Empire Plan members' required out-of-pocket costs for services provided. As a result, United overpaid claims submitted by Dr. Handler and Dr. Moschetto by $903,563 during the period of [the comptroller's] audit."[148]

Both South Island and the individual physicians commenced combined declaratory judgment and Article 78 proceedings challenging the audit findings and the authority of the Comptroller to audit their accounts.[149]

The supreme court held that the Comptroller had exceeded the constitutional authority of the office and enjoined United Health from acting on the recommendations of the Comptroller's audit.[150]

The Third Department concluded that the supreme court erred in concluding that the Comptroller lacked authority to conduct the audit.[151] Noting that the Comptroller is the "independent auditing official for the affairs of the [s]tate," the appellate court observed that "the Comptroller is empowered to conduct audits where the disbursement of state funds is involved" under both the Article V, section 1 of the New York State Constitution and section 11 of the State Finance Law.[152]

> No moneys of the state, including moneys collected in its behalf, and no moneys in the possession, custody or control of any officer, agent, or agency of the state in his or its representative capacity, and no moneys in or belonging to any fund or depositary, title to which is vested in the state, shall hereafter be paid, expended or refunded except upon audit by the [C]omptroller.[153]

While the petitioners conceded that United Health was processing claims for health care services using State monies and United could be audited with regard to those funds by the Comptroller, they argued that once the funds passed into their hands, the Comptroller no longer had authority over them.[154] The Third Department disagreed; based on statutory and case law it concluded that the Comptroller's incidental audit of the non-participating providers was proper in order to carry out his

148. *Id.* at 7.
149. *Hander I*, 23 N.Y.3d 239, 244, 13 N.E.3d 653, 655, 990 N.Y.S.2d 153, 155 (2014).
150. *Id.*
151. *Id.* at 245, 13 N.E.2d at 655-56, 990 N.Y.S.2d at 155-56.
152. *Handler II*, 88 A.D.3d 1187, 1189, 932 N.Y.S.2d 204, 206 (3d Dep't 2011) (alteration in original).
153. *Id.* (alteration in original).
154. *Id.* at 1190, 932 N.Y.S.2d at 206-07.

mandated authority regarding United.[155] The court remitted both cases to the supreme court "to address petitioners' claims that the audit findings were arbitrary and capricious and lacked a rational basis."[156] Petitioners appealed as of right.

The Court of Appeals examined both the history of the Comptrollers' office and the relationship between United and the health care providers. It pointed to Article V of the State Constitution as "the wellspring" of the Comptroller's authority.[157] It also noted that the idea of an independent auditing authority had begun in the State's "colonial days"[158] Subsequently, the Comptroller was created as a constitutional officer and the Legislature enured the officer's independence by "requiring the Comptroller to audit State payments and receipts."[159] Section 167 of the Civil Service Law authorizes the Comptroller to audit State health insurance payments,[160] a matter that petitioners conceded, as the Court notes.[161] The Court then reviewed the relationship between United and the petitioners and urged them to accept the fact that "they are not as far removed from the State's purse as they argue."[162] Noting that they code the source of their payments as United,[163] are provided the chance to "lower their rates when their actual fee exceeds the customary charge,"[164] and know that accepting payment from the State involves the "collection of co-payments,"[165] the Court observed that they were fully aware of their role and what was required of them.[166] The Court concluded that the Comptroller's limited audit was proper, because it focused solely on "billing records for State payments."[167] Consequently, the Court did not have to reach the issue of whether the Comptroller's authority extended more broadly to third parties.[168] The petitioners were sufficiently involved with the State to invite the narrow scrutiny of the

155. *Id.*

156. *Handler I*, 23 N.Y.3d 239, 245, 13 N.E.3d 653, 656, 990 N.Y.S.2d 153, 156 (2014) (citing *Handler II*, 88 A.D.3d at 1191, 932 N.Y.S.2d at 207).

157. *Id.* (citation omitted).

158. *Id.* at 246, 13 N.E.3d at 656, 990 N.Y.S.2d at 156 (citation omitted).

159. *Id.* at 246, 13 N.E.3d at 657, 990 N.Y.S.2d at 157.

160. *Id.*

161. *Handler I*, 23 N.Y.3d at 247, 13 N.E.3d at 657, 990 N.Y.S.2d at 157.

162. *Id.* at 248, 13 N.E.3d at 658, 990 N.Y.S.2d at 158.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Handler I*, 23 N.Y.3d at 248, 13 N.E.3d at 658, 990 N.Y.S.2d at 158.

167. *Id.* at 250, 13 N.E.3d at 659, 990 N.Y.S.2d at 159.

168. *Id.*

Comptroller on how they treated the funds they received and to protect the State fisc against overpayments to them.[169]

D. Agency Interpretation of the Law and the New York State Tax Tribunal

A well-established principle of administrative law is the deference accorded to an agency's interpretation of the laws it is charged with regulating.[170] However, if the law has a plain meaning that does not require a specialized expertise to interpret, the courts are not bound by an agency's interpretation. *Gaied v. New York State Tax Appeals Tribunal* involved the interpretation of the term "statutory resident" by the Department of Taxation and Finance and the standard it applied in determining what is a "permanent place of abode."[171]

Gaied included a rather detailed examination of the domestic arrangements of petitioner Gaied who was a domiciliary of New Jersey for purposes of determining whether petitioner nevertheless owed taxes to New York.[172] There are two tests under which individuals would pay New York State and New York City personal income tax as a resident. The first test is if the individual is domiciled in New York City.[173] The second test provides that a person is a statutory resident for tax purposes if the individual "maintains a permanent place of abode in this state and spends in the aggregate more than [183] days of the taxable year in this state."[174] The second test was at issue in *Gaeid*.

Petitioner came to the attention of the New York taxing authority because he owned a multifamily apartment building on Staten Island near his automotive repair business and the Department of Taxation and Finance perceived him to be a resident of one of the apartments.[175] He had purchased the property both as an investment and as a home for his parents.[176] From 1999 forward, the parents lived in one of the building's

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169. *Id.*

170. BORCHERS & MARKELL, *supra* note 86, § 3.17-3.18.

171. *Gaied I*, 22 N.Y.3d 592, 594, 6 N.E.3d 1113, 1114, 983 N.Y.S.2d 757, 758 (2014).

172. *Id.*

173. *Id.* at 597, 6 N.E.3d at 1116, 983 N.Y.S.2d at 760 (citing N.Y. Tax Law § 605(b)(1)(A)(i) (McKinney 2014)) ("A resident individual means an individual . . . who is domiciled in this state, unless . . . the taxpayer maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state").

174. *Id.* (alteration in original) (citing N.Y. Tax Law § 605(b)(1)(B)).

175. *Id.* at 594, 6 N.E.3d at 1114, 983 N.Y.S.2d at 758.

176. *Gaied I*, 22 N.Y.3d at 594, 6 N.E.3d at 1114, 983 N.Y.S.2d at 758.

apartments and the other apartments were leased to strangers.[177] Petitioner supported his parents and occasionally slept there while he attended to their medical care.[178] He claimed them as "dependents on his federal, New Jersey, and New York tax returns."[179] Although he had keys to the apartment, paid the utility bills for the apartment, and listed a telephone number under his name for the apartment, he claimed that he never lived at the apartment, and did not keep personal effects there.[180] In 2003, petitioner sold his New Jersey residence, but instead of staying with his parents, he stayed with an uncle who lived in New Jersey.[181]

After auditing the petitioner's New York nonresident income tax returns to the tax years in question, the Department issued a Notice of Deficiency indicating that he owed an additional $253,062 in New York State and City income taxes, plus interest. It determined that he was a "'statutory resident' of New York" under Tax Law section 605(b)(1)(B) on the grounds that "he spent over 183 days in New York City and maintained a 'permanent place of abode' at the Staten Island property during those years."[182]

After a hearing based on petitioner's request for a redetermination, an Administrative Law Judge (ALJ) sustained the Notice of Deficiency.[183] Petitioner filed an exception.[184]

The Tax Appeals Tribunal initially reversed the ALJ's determination on the grounds that "petitioner did 'not have living quarters at his parents' apartment' and, therefore, he did not maintain a permanent place of abode."[185]

On re-argument, the Tax Department urged the Tribunal to reverse its decision based on precedent holding that a statutory taxpayer "need not actually dwell in the permanent place of abode, but need only maintain it."[186] The Tribunal reversed itself, sustaining the deficiency with one dissent.[187] Acknowledging what it described as its erroneous

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177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Gaied I*, 22 N.Y.3d at 595, 6 N.E.3d at 1114, 983 N.Y.S.2d at 758.
182. *Id.* (citation omitted).
183. *Id.* at 595, 6 N.E.3d at 1115, 983 N.Y.S.2d at 759 (citing 2009 N.Y. Tax LEXIS 86, N.Y. State Div. of Tax Appeals, DTA No. 821727 (Aug. 6, 2009)).
184. *Id.*
185. *Id.* (quoting 2010 N.Y. Tax LEXIS 117, at *23, N.Y. State Div. of Tax Appeals, DTA No. 821727 (July 8, 2010)).
186. *Gaied I*, 22 N.Y.3d at 595-6, 6 N.E.3d at 1115, 983 N.Y.S.2d at 759.
187. *Id.* at 596, 6 N.E.3d at 1115, 983 N.Y.S.2d at 759 (citing *In re* Gaied, DTA No.

departure from precedent, the Tribunal held that a statutory taxpayer need only maintain the property, not live in it.[188] It supported its decision with the evidence regarding petitioner's occasional overnight stays for care for his father, and his use of his name and the apartment address for the utility and telephone bills, and the other leases.[189] The dissent concluded that the Tribunal's original decision was a practical construction of the statute.[190]

In the subsequent Article 78 proceeding, the appellate division affirmed the Tribunal's second decision over two dissents, stating that it was constrained to do so because the determination was "amply supported by the record."[191] The dissent characterized the Tribunal's decision as "irrational and unreasonable" because the petitioner did not live in the residence.[192] Petitioner appealed.[193]

The Court of Appeals noted that petitioner conceded that he was in New York City more than 183 days during each of the tax years at issue.[194] Thus, the determination of whether petitioner is a statutory resident involved whether the apartment was a permanent place of abode in New York.[195] The Court reviewed the legislative history and the regulatory definition of permanent place of abode. It observed that in its earlier decision, *Tamagni v. Tax Appeals Tribunal*, the Court had concluded that the "statutory residence provision fulfils the significant function of taxing individuals who are 'really and [for] all intents and purposes . . . residents of the state' but 'have maintained a voting residence elsewhere and insist on paying taxes to us as nonresidents,'" thus discouraging tax evasion by New Yorkers.[196]

While the Tax Law does not define "permanent place of abode," Tax Department regulations define it as "a dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer, [which] will generally include a dwelling place owned or leased

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821727, N.Y. State Tax Appeals Trib. (June 16, 2011), *available at* http://www.dta.ny.gov/pdf/archive/Decisions/821727.2.dec.pdf).

188. *Id.* (citing *In re Gaied*, DTA No. 821727, at *19).

189. *Id.*

190. *Id.* (citing *In re Gaied*, DTA No. 821727, at *20 (Tully, Pres., dissenting)).

191. Gaied v. N.Y. State Tax Appeals Trib. (*Gaied II*), 101 A.D.3d 1492, 1494, 947 N.Y.S.2d 480, 842 (3d Dep't 2012) (citation omitted).

192. *Id*. at 1496, 947 N.Y.S.2d at 484 (Malone, Jr., J., dissenting).

193. *Gaied I*, 22 N.Y.3d at 597, 6 N.E.3d at 1116, 983 N.Y.S.2d at 760.

194. *Id.*

195. *Id.*

196. *Id.* (alterations in original) (quoting Tamagni v. Tax Appeals Tribunal, 91 N.Y.2d 530, 535, 695 N.E.2d 1125, 1128, 673 N.Y.S.2d 44, 47 (1998))

by such taxpayer's spouse."[197] Because the Court's review of the agency's determination that petitioner need not live in the residence but merely maintain it was consistent with the meaning and intent of the statute, the Court concluded that the Tax Department's interpretation lacked a rational basis.[198] Both the legislative history of the statute and the regulation supports the view that a permanent place of abode in New York requires that the taxpayer must have a residential interest in the property, and not merely maintain the property.[199]

E. FOIL and Personal Privacy

Happy Anniversary FOIL and Happy Anniversary to the Committee on Open Government, both of which celebrated forty years of existence in 2014.[200] FOIL, found in Article 6 of the Public Officers Law, operates on a presumption of access.[201] All of an agency's records are reviewable unless the agency can establish that the documents fall within one or more of the ten exemptions set out in the statute.[202] These exemptions are

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197. N.Y. COMP. CODES R. & REGS. tit. 20, § 105.20(e)(1) (2009).

198. *Gaied I*, 22 N.Y.3d at 598, 6 N.E.3d at 1116, 983 N.Y.S.2d at 760.

199. *Id.*

200. *See generally* 40 YEARS OF FOIL AND THE COMM. ON OPEN GOV'T, COMM. ON OPEN GOV'T (2014), *available at* http://www.dos.ny.gov/coog/pdfs/Timeline2014.pdf (last visited Mar. 30, 2015); *see also Timeline: 40 Years of FOIL and the Committee on Open Government*, DEP'T OF STATE: COMM. ON OPEN GOV'T, http://www.dos.ny.gov/coog/news/september14.html (last visited Mar. 30, 2015).

201. *See* BORCHERS & MARKELL, *supra* note 86, § 5.9.

202. *See* N.Y. PUB. OFF. LAW § 87(2) (McKinney 2014). These are documents which:

> (a) are specifically exempted from disclosure by state or federal statute; (b) . . . would constitute an unwarranted invasion of personal privacy . . . ; (c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations; (d) are trade secrets or are submitted [by] . . . or derived from information obtained from a commercial enterprise and . . . would cause substantial injury to the competitive position of the subjective enterprise; (e) are compiled for law enforcement purposes and . . . (i) [would] interfere with law enforcement investigations or judicial proceedings; (ii) deprive a person of a right to a fair trial or impartial adjudication; (iii) identify a confidential source or disclose confidential information relating to a criminal investigation; (iv) reveal criminal investigative techniques or procedures, except routine techniques and procedures; (f) [could] if disclosed . . . endanger the life or safety of any person; (g) are inter-agency or intra-agency [communications except to the extent that such materials consist of] (i) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; (iii) final agency policy or determinations; (iv) [or] external audits . . . ; (h) are examination questions or answers [that] are requested prior to the final administration of such questions [that]; (i) if disclosed, would jeopardize the capacity of an

narrowly construed and the burden is on the person claiming the exemption to prove that it applies.[203] The general provisions regarding access are found in section 89 of the Public Officers Law. Section 89 describes the Committee on Open Government,[204] the procedures for requesting records and appealing agency decisions regarding disclosure,[205] the procedures relating to protection of trade secrets and critical infrastructure information,[206] as well as the rules regarding the prevention of "unwarranted invasions of personal privacy."[207] The section further provides that the Committee on Open Government may promulgate guidelines for redaction, deletion, and withholding of records to prevent invasions of privacy.[208]

Subdivision (7) of section 89 speaks specifically to the privacy protections afforded to public employees' retirement systems. It states that:

> agency . . . to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures or; (j) are photographs, microphotographs, videotape or other recorded images prepared [pursuant to the vehicle and traffic law].

Id. § 87(2)(a)-(j).

203. *See* N.Y. PUB. OFF. LAW § 87(2).

204. *Id.* § 89(1).

205. *Id.* § 89(3)-(4).

206. *Id.* § 89(5).

207. *Id.* § 89(2). Section 89(2)(b) defines an unwarranted invasion of personal privacy as:

> i. disclosure of employment, medical or credit histories or personal references of applicants for employment; ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility; iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes; iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law; or vii. disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law.

N.Y. PUB. OFFS. LAW § 89(2)(b)(i)-(vii). The definition is not exclusive, however. *Id.* § 89(2)(b).

208. *Id.* § 89(2)(a).

> Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public employees' retirement system or of an applicant for appointment to public employment . . . .[209]

The FOIL case heard by the Court examined the language of section 89(7) and its relationship to personal privacy.[210] Petitioner Empire Center for New York State Policy ("Empire Center"), identified in the Court's opinion as a self-described "think-tank" the purpose of which is to "inform voters and policy makers about issues including pension reform,"[211] sought disclosure of names and addresses, "of retired members of New York State and New York City teachers' retirement systems.[212] Both the State and City retirement systems refused to release the names of the retirees.[213]

One might also describe both the Empire Center and the public retirement systems as indefatigable. Empire Center had previously sought the names and addresses of the retirees of the New York City Police.[214] The City Police pension system refused to release the names of its retirees.[215]

Following unsuccessful administrative appeals in all three cases, Empire Center commenced Article 78 proceedings in the appellate

209. *Id.* § 89(7).

210. Empire Ctr. for N.Y. State Policy v. N.Y. State Teachers' Ret. Sys. (*Empire Ctr. I*), 23 N.Y.3d 438, 444, 15 N.E.3d 271, 272, 991 N.Y.S.2d 516, 517 (2014).

211. *Id.* (internal quotation marks omitted). The Center's website describes the Center's mission as making "New York a better place to live and work by promoting public policy reforms grounded in free-market principles, personal responsibility, and the ideals of effective and accountable government." *About the Center*, EMPIRE CENTER, http://www.empirecenter.org/about-the-center (last visited Mar. 30, 2015).

212. *Empire Ctr. I*, 23 N.Y.3d at 444, 15 N.E.3d at 272, 991 N.Y.S.2d at 517. Petitioner also sought for each retiree his or her "last employer, cumulative years of service at retirement, gross retirement benefit for the years 2010 and 2011, retirement date and date of commencement of retirement system membership." Empire Ctr. for N.Y. State Policy v. Teachers' Ret. Sys. of the City of N.Y. (*Empire Ctr. II*), No. 102055/12, 2012 N.Y. Slip Op. 32216(U), at 2 (Sup. Ct. N.Y. Cnty. 2012).

213. *Empire Ctr. I*, 23 N.Y.3d at 444, 15 N.E.3d at 272, 991 N.Y.S.2d at 517 (citing Empire Ctr. for N.Y. State Policy v. N.Y. State Teachers' Ret. Sys. (*Empire Ctr. III*), 103 A.D.3d 1009, 961 N.Y.S.2d 329 (3d Dep't 2013); Empire Ctr. for N.Y. State Policy v. Teachers' Ret. Sys. of the City of N.Y. (*Empire Ctr. IV*), 103 A.D.3d 593, 959 N.Y.S.2d 911 (1st Dep't 2013)).

214. Empire Ctr. for N.Y. State Policy v. N.Y. City Police Pension Fund (*Empire Ctr. V*), 88 A.D.3d 520, 520-21, 930 N.Y.S.2d 576, 577 (1st Dep't 2011).

215. *Id.*

division. In all three cases the appellate division ruled that Empire Center was not entitled to the names of the retirees.[216]

This result might seem puzzling when the first sentence of section 89(7) addresses the protection of the "*home address* of an officer or employee, former officer or employee, or of a retiree . . . ." but says nothing about protecting the retiree's name.[217] An explanation for the results in the appellate divisions' and the Court of Appeals' decision to hear the cases involving the teachers' retirement systems lies with a previous decision of the Court in *New York Veteran Police Association v. New York City Police Department Article I Pension Fund*.[218]

In *New York Veteran Police Association*, petitioner not-for-profit corporation, which assisted its members who were retired police officers with information and services relating to their pensions, sought the names and addresses of retired officers of the New York City Police Department.[219] The association had regularly obtained the names and address of the retired officers until 1978.[220] When the request was made thereafter pursuant to FOIL, the Pension Fund denied the request on the grounds that "compliance would invade the privacy of retired police officers and their families and might endanger their lives and safety."[221] The Special Term denied the association's application relying on the safety reasons and apparent belief that the association had used the names "to solicit new members and sell police-related goods" and had given third parties access to the names.[222]

The First Department reversed and granted the application.[223] It observed that the association had protected the names, that a problem caused by an outside fundraising organization used by the association on one occasion should not be attributed to the association, and that soliciting new members was not "fund raising" that would run afoul of FOIL.[224] It also noted that while fear for the officers' safety was the only

216. *Id.* at 521, 930 N.Y.S.2d at 577; *Empire Ctr. III*, 103 A.D.3d at 1011, 961 N.Y.S.2d at 330; *Empire Ctr. IV*, 103 A.D.3d at 593, 959 N.Y.S.2d at 911.

217. *Empire Ctr. III*, 103 A.D.3d at 1010, 961 N.Y.S.2d at 330 (emphasis added).

218. *N.Y. Veteran Police Ass'n I*, 61 N.Y.2d 659, 460 N.E.2d 226, 472 N.Y.S.2d 85 (1983).

219. *Id.* at 660, 460 N.E.2d at 226, 472 N.Y.S.2d at 85.

220. N.Y. Veteran Police Ass'n v. N.Y.C. Police Dep't Article I Pension Fund (*N.Y. Veteran Police Ass'n II*), 92 A.D.2d 772, 772, 459 N.Y.S.2d 770, 771 (1st Dep't 1983); *see also N.Y. Veteran Police Ass'n I*, 61 N.Y.2d at 660, 460 N.E.2d at 226, 472 N.Y.S.2d at 85.

221. *N.Y. Veteran Police Ass'n II*, 92 A.D.2d at 772, 459 N.Y.S.2d at 771.

222. *Id.* (internal quotation marks omitted).

223. *Id.*

224. *Id.*

argument which might give the court pause, such fear was dissipated by a record of safe disclosure up until 1978 and thus mere speculation.[225]

While *New York Veteran Police Association* was making its way through the courts, section 89 of the Public Officers Law was amended to add subdivision (7) to provide, as it does in 2014, that neither disclosure of the home address of an officer or employee, former officer or employee, or of a retiree, nor disclosure of the name, home address of "beneficiary of such system" is required.[226] When confronted with this amendment in *New York Veteran Police Association*, which had taken effect immediately and was applicable to all pending cases, the Court of Appeals tersely announced in a memorandum decision that "[t]he provisions of the amendment apply to this proceeding which was pending before the court at the time it became effective and foreclose relief to petitioner."[227]

Thirty-one years later, in *Empire Center for New York State Policy*, the Court of Appeals recalled this history.[228] It noted that there had been no suggestion in *New York Veteran Police Association* that petitioner wanted disclosure of names without addresses nor was partial relief contemplated by the Court as the names without addresses "would have been of little use to an organization that wanted to send out a membership solicitation."[229]

The 2014 Court of Appeals viewed the lower courts' reliance on *New York Veteran Police Association* as an interpretation that the decision precluded partial relief.[230] The Court noted: "[i]n this they erred. Our decisions are not to be read as deciding questions that were not before us and that we did not consider."[231] The retirement systems also argued that release of the names would constitute an unwarranted invasion of privacy because, armed with the retiree names and a few strokes of a keyboard, a searcher would likely find most, if not all, of the addresses and thus undercut section 89(7)'s protection.[232] The Court declined to adopt this argument noting that such a claim was speculative based on the

225. *Id.* at 773, 459 N.Y.S.2d at 772.

226. *N.Y. Veteran Police Ass'n I*, 61 N.Y.2d 659, 661, 460 N.E.2d 226, 226, 472 N.Y.S.2d 85, 85 (1983).

227. *Id.* at 661, 460 N.E.2d at 226-27, 472 N.Y.S.2d at 86.

228. *Empire Ctr. I*, 23 N.Y.3d 438, 445, 15 N.E.3d 271, 273, 991 N.Y.S.2d 516, 518 (2014).

229. *Id.* at 446, 15 N.E.3d at 273, 991 N.Y.S.2d at 518.

230. *Id.*

231. *Id.* at 446, 15 N.E.3d at 274, 991 N.Y.S.2d at 519.

232. *Id.*

record before it, given that Empire Center, unlike the petitioner in *New York Veteran Police Association*, was not interested in soliciting members.[233] Given the absence of such purpose, the Court declined to do what it chided the lower courts for doing; namely, "deciding questions that were not before us . . . ."[234]

II. EXECUTIVE BRANCH

Governor Andrew Cuomo took a number of noteworthy steps by Executive Order relating to juvenile justice, veterans, transportation of crude oil and public safety.

A. Juvenile Justice

On April 2014, the Governor announced the creation of the Commission on Youth, Public Safety and Justice ("Commission").[235] This Commission is designed to "develop a plan to raise the age of juvenile jurisdiction, and . . . make other recommendations as to how New York's justice systems can improve outcomes for youth while promoting community safety."[236] The Commission was formed in response to concerns that New York is one of only two states that prosecute individuals between the ages of sixteen and seventeen in adult criminal courts despite data showing that "felony recidivism rate in one state was [thirty-four] percent higher for youth whose cases were handled in adult court compared to youth whose cases were handled outside of adult court."[237] The Commission's recommendations are due on December 31, 2014.[238]

B. Veterans and Military Affairs

On March 20, 2014, the Governor announced the creation of the New York State Council on Veterans, Military Members and Their Families ("Council").[239] The Council follows on the work of its

233. *Empire Ctr. I*, 23 N.Y.3d at 446, 15 N.E.3d at 274, 991 N.Y.S.2d at 519.
234. *Id.*
235. Exec. Order No. 131, Establishing the Commission on Youth, Public Safety and Justice, N.Y. EXECUTIVE CHAMBER (Apr. 9, 2014), *available at* http://www.governor.ny.gov/news/no-131-establishing-commission-youth-public-safety-and-justice.
236. *Id.*
237. *Id.*
238. *Id.*
239. Exec. Order No. 130, Establishing the New York State Council on Veterans, Military Members and Their Families, N.Y. EXECUTIVE CHAMBER (Mar. 20, 2014), *available*

predecessor, the New York State Council on Returning Veterans and Their Families.[240] The 2014 Council is charged with a broad range of activities that will highlight and address the needs of veterans and their families.[241] The Council members include a broad range of state officials,[242] and others who can assist the council in fulfilling its tasks,[243] demonstrating the breadth and scope of the needs of the individuals who have served our country.

C. Crude Oil and Public Safety

On January 28, 2014, the Governor directed that the following State agencies exercise more oversight of the transportation of crude oil across New York State: The Department of Environmental Conservation ("DEC"), The Department of Transportation ("DOT"), The Division of Homeland Security and Emergency Services ("DHSES"), The

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at http://www.governor.ny.gov/news/no-130-establishing-new-york-state-council-veterans-military-members-and-their-families.

240. The New York State Council on Returning Veterans and Their Families was established by Governor David Paterson in 2008, and its work was continued by Governor Andrew Cuomo in 2011. *Id.* at 2.

241. *Id.*

242. State officials or their designees include:

> [T]he Director of the Division of Veterans Affairs; the Adjutant General of the Division of Military and Naval Affairs; the Commissioner of Health; the Commissioner of Mental Health; the Commissioner of Alcoholism and Substance Abuse Services; the Commissioner of Homes and Community Renewal; the Commissioner of Economic Development; the Director of the Office for the Aging; the Commissioner of Labor; the Commissioner of Tax and Finance; the Commissioner of Motor Vehicles; the Commissioner of Education; the Commissioner of General Services, the Commissioner of Civil Service; the Commissioner of Temporary and Disability Assistance; the Commissioner of Environmental Conservation; the Commissioner of Corrections and Community Supervision; the Secretary of State; the Commissioner of Parks, Recreation, and Historic Preservation; the President of the Higher Education Services Corporation; the Chancellor of the State University of New York; and the Chancellor of the City University of New York.

Id. at 2-3.

243. Other members of the Commission include

> one or more veterans, military members or family members of military members or veterans, a representative of an organization that provides behavioral health services to military members, veterans or their families; a representative of an organization that provides substance abuse counseling services to military members, veterans or their families; and an academic who specializes in military or veterans affairs; a representative of local government.

Id. at 3.

Department of Health ("DOH"), and The New York State Energy Research and Development Authority ("NYSERDA").[244]

Noting the railway derailments in Lac-Megantic, Quebec in July 2013, and in Casselton, North Dakota in December 31, 2013, which caused devastation in these communities, the Governor ordered DEC, DOT, DHSES, DOH and NYSERDA to request that the federal government upgrade its requirements regarding safe transportation of crude oil, conduct an assessment of the State's spill prevention and response requirements, and report to the Governor by April 2014 on the status of the State's preparedness and to recommend steps for improving the state's response.[245]

In April 2014, the agencies issued a report entitled *Transporting Crude Oil in New York State: A Review of Incident Prevention and Response Capacity* which "provides an overview of the public safety and environmental risks inherent in the domestic crude oil boom" and lists twenty-seven recommendations to address concerns about transporting crude oil.[246]

III. LEGISLATIVE

The Governor has signed several bills which will impact the work of some State agencies, including the Division of Alcoholic Beverage Control, the Department of Education, and the Public Service Commission. Among the more notable bills are the following:

A. Division of Alcoholic Beverage Control—Regulatory Policy and Expanded Licensing and Permits for Manufacturing Beverage Alcohol

Chapter 406 of the 2014 Laws of New York amends section 2 of the Alcoholic Beverage Control Law to expand the regulatory policy of the State regarding beverage alcohol to include "to the extent possible, supporting economic growth, job development, and the state's alcoholic beverage production industries and its tourism and recreation industry; and which promotes the conservation and enhancement of state

244. Exec. Order No. 125, Directing DEC, DOT, DHSES, DOH, and NYSERDA to Strengthen the States Oversight of Shipments of Petroleum Products, N.Y. EXECUTIVE CHAMBER (Jan. 28, 2014), *available at* http://www.governor.ny.gov/news/no-125-directing-dec-dot-dhses-doh-and-nyserda-strengthen-states-oversight-shipments-petroleum.

245. *Id.*

246. *See* Press Release, Governor Cuomo Takes Action to Better Protect New York From Crude Oil Transportation Disasters 3 (Apr. 30, 2014), *available at* http://www.governor.ny.gov/news/governor-cuomo-takes-action-better-protect-new-york-crude-oil-transportation-disasters.

agricultural lands; provided that such activities do not conflict with the primary regulatory objectives of this chapter."[247]

This legislation recognizes that the previous policy regarding regulation of beverage alcohol was crafted in an earlier time, and that the use and acceptance of beverage alcohol has changed and now presents New York with opportunities for economic development.[248] The Sponsors credit the New York State Law Revision Commission with the proposal for changing the policy which was expressed in the Commission's 2009 Report, *The Alcoholic Beverage Control Law and its Administration*.[249] The Commission acknowledged in its report that public health and safety remain today as abiding concerns in the regulation of beverage alcohol; however, the promotion of economic development is a competing concern, one already expressed in parts of provisions of the Alcoholic Beverage Control Law.[250] The Commission concluded that

> While economic development would provide a significant advantage to New York, it is difficult to imagine how a policy that encourages economic development can co-exist with concerns over public health and safety. Yet at the same time [it] recognize[d] that a call for elevating economic growth to an expressed policy concern should not go unheeded.[251]

Thus, the Commission concluded that "any statement of policy should promote health, safety, and welfare with respect to alcohol consumption while allowing for economic growth to the extent that it does not impede the primary objectives of the ABC Law."[252]

Chapter 431 of the 2014 Laws of New York also amends the Alcoholic Beverage Control Law. These amendments raise the production caps on "farm" and "micro" manufacturers; allow farm distilleries to operate a branch office; allow all manufacturers to conduct tastings and sell, by the bottle or glass, the alcoholic beverages they manufacture without obtaining a separate license; and lower the food requirement in a manufacturer's on-premises license.[253] This legislation

247. 2014 *McKinney's Sess. Law News* A-8679 (legislative memorandum).

248. *Id.*

249. *Id.*; REPORT ON THE ALCOHOLIC BEVERAGE CONTROL LAW AND ITS ADMINISTRATION, N.Y. STATE LAW REVISION COMM'N (Dec. 15, 2009), *available at* http://nyslawrevision.files.wordpress.com/2014/07/12-15-09-report-on-abc-law.pdf.

250. REPORT ON THE ALCOHOLIC BEVERAGE CONTROL LAW AND ITS ADMINISTRATION, *supra* note 249, at 10-19.

251. *Id.* at 10-11.

252. *Id.* at 11.

253. 2014 *McKinney's Sess. Law News* A-10122.

removes the overly restrictive limits and confusing laws governing local manufacturers of beverage alcohol and affords them greater marketing opportunities for their products.[254]

This legislation is an outgrowth of the previously mentioned 2009 Law Revision Commission study of the Alcoholic Beverage Control Law which recommended changes to the Alcoholic Beverage Control Law to improve the ability of craft brewers, cider producers, distillers and vintners to manufacture and market their product.[255]

B. Department of Education—Education and Technology

Chapter 513 of the 2014 Laws of New York requires the Commissioner of Education to establish a committee to make recommendations on how to create a "cohesive program for virtual and online learning statewide" in response to the needs of rural schools and other geographically isolated schools, decreasing school budgets, and diminished course offerings as a result of limited funds.[256] The Committee will be comprised of eleven members[257] and will work with the New York State broadband program office, New York State Energy Research and Development Agency, and the New York State Public Services Commission.[258] The Committee's final report is due on October 1, 2015.[259]

The impetus for the legislation is the desire to improve the quality of education for all New York students, provide opportunities for experience in the use of technology, and to make the students more competitive in the employment marketplace.[260] The law took effect immediately and will be considered repealed on October 1, 2015 when the final report of the Committee is due to the Governor and Legislature.[261]

254. *See generally id.*
255. *See* REPORT ON THE ALCOHOLIC BEVERAGE CONTROL LAW AND ITS ADMINISTRATION, *supra* note 249.
256. *See* Justification, Act of May 16, 2013, ch. 513, 2013 N.Y. Law 5509-B, *available at* http://open.nysenate.gov/legislation/bill/S5509B-2013; *see also* 2014 *McKinney's Sess. Law News* S.5509-C.
257. *Id.* § 1.1
258. *Id.* § 1.
259. *Id.* § 3.
260. *See id.* § 1.
261. 2014 *McKinney's Sess. Law News* S.5509-C §§ 3-4.

C. Public Service Commission—Energy

Chapter 510 of the 2014 Laws of New York requires the Public Service Commission to conduct a study of the economic and environmental benefits and costs associated with the State's net metering laws.[262] Net metering, authorized by section 66-j of the Public Service Law, allows a consumer to "operate[] onsite electric generator displacing load (service) that would otherwise be delivered by local utility."[263] Chapter 510 adds a new section 66-n to the Public Service Law.[264] Although New York has had net metering laws since 1997, concerns have been expressed over the socialized costs to ratepayers who have not installed renewable generating systems, as well as questions that ask for a clearer picture of the environmental benefits achieved for the state as a whole and the avoided costs realized by customer generators.[265] The purpose of the study called for by Chapter 510 is to provide a non-biased and comprehensive analysis of the use of net metering so that in moving forward policy makers will be better informed.[266]

CONCLUSION

New York is always witnessing advances in administrative law as reflected once again in this year's developments. Despite the fact that the decisions of the Court of Appeals addressed fundamental principles of administrative law, an analysis of the facts of individual cases clarified our understanding of these rules. Both the decisions in *Handler v. Dryden* and *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene* engendered their share of controversy as both issues, hydrofracking and sugary soft drinks, will not disappear from view anytime soon. Outcomes of the activities on the Executive and Legislative branches may make their way into the judicial branch over the next several years, giving us all more to learn about administrative law.

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262. 2014 *McKinney's Sess. Law News* S.5149-A (legislative memorandum); *see* Act of December 17, 2014, ch. 510, 2014 McKinney's Sess. Laws of N.Y. S. 5149-A (to be codified at N.Y. PUB. SERV. LAW § 66-n).

263. *New York State Net Metering: Legislative Changes*, N.Y. STATE DEP'T OF PUB. SERV. (Sept. 2009), http://www.nyc.gov/html/dob/downloads/pdf/Net_Metering.pdf.

264. 2014 *McKinney's Sess. Law News* S. 5149-A (legislative memorandum); *see* Act of December 17, 2014, ch. 510, 2014 McKinney's Sess. Laws of N.Y. S. 5149-A (to be codified at N.Y. PUB. SERV. LAW § 66-n).

265. *Id.*

266. *Id.*